THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW

FACULTY LIBRARY

Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

http://www.archive.org/details/casesadjudgedins05penniala

LAW DEPARTMENT.
AUG 18 1898
C. R. R. CO. OF N. J.

Pennsylvania. Reports. Supreme Court.

REPORTS

OF

CASES

ADJUDGED IN

THE SUPREME COURT

OF

PENNSYLVANIA.

BY

WILLIAM RAWLE

WITH NOTES REFERRING TO CASES IN THE SUBSEQUENT REPORTS.

BY

WILLIAM WYNNE WISTER, JUN.,

CONTINUED BY

ELLIS AMES BALLARD.

VOL. V.

PHILADELPHIA:
T. & J. W. JOHNSON & CO.,
LAW BOOKSELLERS, PUBLISHERS, AND IMPORTERS,
No. 535 CHESTNUT STREET.
1885.

KFP
45
.A19
1828
1885
v.5

Entered according to the Act of Congress, in the year 1885,

BY T. & J. W. JOHNSON & CO.,

In the Office of the Librarian of Congress, at Washington.

ADVERTISEMENT.

In giving to the public the closing volume of Rawle's Reports, the reporter avails himself of the opportunity to state, that for the greater portion of its contents, the profession are indebted to the valuable labours of his friend, Peter M'Call, Esquire.

778512

JUDGES

OF THE

SUPREME COURT OF PENNSYLVANIA

DURING THE PERIOD OF THESE REPORTS.

JOHN BANNISTER GIBSON, Esq., — Chief Justice.

MOLTON C. ROGERS, Esq., ...
CHARLES HUSTON, Esq., ...
JOHN KENNEDY, Esq., ... } Justices.
THOMAS SERGEANT, Esq., ...

ATTORNEY-GENERAL.

GEORGE M. DALLAS, Esq.

TABLE OF CASES.

[References are to the top paging.]

A.

PAGE

Abercrombie, Boyle *v.* 144
Allen *v.* Myers, ... 335
Austin's Case, ... 191

B.

Babb *v.* Reed, ... 151
Bailey *v.* The Commonwealth, . . 59
Baker, Lewis *v.* 114
Bechtol, Walter *v.* 228
Beckman *v.* Shouse, ... 179
Bennett *v.* Morris, ... 9
Bonsall, Smith *v.* 80
Boyle *v.* Abercrombie, ... 144
Brooke, Wynn *v.* 106
Bulkly, Robinson *v.* 227
Burt *v.* Kurtz, ... 246

C.

Chew *v.* Com. of Southwark, . . . 160
Clark *v.* Morton, ... 235
Commonwealth *v.* Bailey, ... 59
Commonwealth *v.* County Commissioners, ... 75
Commonwealth *v.* Hellings, . . . 64
Corlies *v.* Stanbridge, ... 286
Craig *v.* Craig, ... 91
Cramond, Yard *v.* 18

D.

Desilver's Estate, ... 111
Donahue *v.* Dougherty, ... 124
Downing *v.* Funk, ... 69

E.

Earle, Wood *v.* 44
Earnest *v.* Earnest, ... 213

F.

Fletcher *v.* Stanbridge, ... 286
Funk, Downing *v.* 69

G.

Gest *v.* Heiskill, ... 134

H.

Harland's Accounts, ... 323
Helffenstein *v.* Thomas, ... 209

PAGE

Hellings *v.* The Commonwealth, . 64
High, Wildemuth *v.* 321
Hodgson *v.* Gemmil, ... 99
Hoover, Pennock *v* 291
Hunter, Troubat *v.* 257

J.

Jenks, Parry *v.* 221
Jones *v.* Orum, ... 249

K.

Kemmerer *v.* Young, ... 175
Kessler, Schieffelin *v.* 115
Koch's Estate, ... 338
Kurtz, Burt *v.* 246

L.

Largy, Walters *v.* 131
Lewis *v.* Baker, ... 114

M.

Maris, Taylor's Executors *v.* . . . 51
Masterson *v.* Masterson, ... 137
Miller *v.* Schneider, ... 140
Moliere *v.* Penn. Fire Ins. Co., . . 342
Moore, Smith *v.* 348
Morris, Bennett *v.* 9
Morton, Clark *v.* 235
Myers, Allen *v.* 335

O.

Orum, Jones *v.* 249

P.

Parry *v.* Jenks, ... 221
Pennock *v.* Hoover, ... 291
Perit *v.* Pittfield, ... 166
Perot, Willing *v.* 264

R.

Rattew, Waddell *v.* 231
Reed, Babb *v.* 151
Rees, Spicer *v.* 119
Reigel, Thomas *v.* 266
Road in Plymouth Township, . . 150
Robinson *v.* Bulkly, ... 227

S.

PAGE

Schieffelin v. Kessler, ... 115
Schneider, Miller v. 140
Shouse, Beckman v. 179
Smith v. Bonsall, ... 80
v. Moore, ... 348
Spicer v Rees, ... 119
Stanbridge, Corlies v. 286
Swift v. The Union Canal Co., . . 46

T.

Taylor's Executors v. Maris, . . . 51
Thomas, Helffenstein v. 209
Thomas v. Jenks, ... 221
Thomas v. Reigel, ... 266
Troubat v. Hunter, ... 257

W.

Waddell v. Rattew, ... 231
Walter v. Bechtol, ... 228
Walters v. Largy, ... 131
White v. White, ... 61
Wildemuth v. High, ... 321
Willing v. Perot, ... 264
Wood v. Earle, ... 44
Wynn v. Brooke, ... 106

Y.

Yard v. Cramond, ... 18
Young, Kemmerer v. 175

LAW DEPARTMENT. AUG 25 1898 CO. OF N. J.

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

EASTERN DISTRICT—DECEMBER TERM, 1834.

[PHILADELPHIA, JANUARY 12, 1835.]

Bennett *against* Morris.

CASE STATED.

Testator devised to his daughter C. when she came of age, "to be hers during her natural life: and then to be her only heir during its life."

C. was the sole heir of the testator at his death.

Held, that the devise to C.'s heir was not void for uncertainty; that C. took an estate for life, with contingent remainder for life to the person who should be her heir,—heir being *designatio personæ:* and that the remainder was defeated by a bargain and sale in fee simple made by C. which united her estate for life, and reversion in fee, so as to make one entire estate in the vendee, incapable of afterwards opening so as to let in the contingent remainder.

Quere. Whether under a gift or devise to heir or heirs in Pennsylvania, the heir at common law, or heirs according to the intestate act, be entitled?

THIS was a case stated for the opinion of the court.

Both parties claimed under the will of Richard Whitman, the maternal grandfather of the plaintiff; which as far as it was material to the case, is as follows: "I leave and bequeath my only daughter, Charlotte, my house and land I now possess, and likewise anything that is coming to me of my father's estate, let it be more or less. I leave it to my said daughter

to be hers when she comes of age. And likewise I leave my brother Nathan to be my whole and sole executor of my estate, and to act for my daughter in rectifying my effects, &c.; and for my house and land I now live on, he is to rent it out

[*10] *in the best manner he can, till Charlotte comes to age, then it is hers during her natural life; and then to be her only heir during its life; and the rent of the said place before she comes to age, is to bring her up on, and to keep the place in repair till she is of age."

Charlotte, the devisee, intermarried with Jacob Bennett, and had issue, eight children, of whom the plaintiff was the eldest.

Jacob Bennett and wife, by deed dated April 28th, 1812, conveyed the premises in question to William Davidson in fee, who devised them to his widow and children, under whom the defendants were in possession as tenants for years.

Charlotte was sole heir of the testator at his death.

Kittera, for the plaintiff:—

Charlotte took by the will an estate for life, with contingent remainder to her heir during life, and the reversion being undisposed of, descended on her as sole heir of the testator. The word heir in the clause creating the remainder is *designatio personæ*, and means such person or persons as at her death shall answer the description of her heir at law; either the eldest son of Charlotte living at her death, or all her children, according to the construction which the court shall put upon the will. The plaintiff is her eldest son, and heir at common law, but is willing that his brothers and sisters may come in, if such a construction can be allowed. The intermediate life estate is not affected by her having a life estate, and also the reversion. A devise to one who is heir for life, the remainder in contingency, is good, and the descent of the reversion shall not drown the estate for life. T. Raym. 28, Plunket *v.* Holmes; 2 Ro, 425, the Sergeant's Case. If the devise to the daughter had been followed by any words of inheritance introduced into the subsequent devise, it would have been an estate in fee or in tail, according to the mode of expression. But the estate to her is for life, and the succeeding

estate is for life. Of course whoever takes under this clause of the will, takes by purchase. Heirs taking always as heirs, and through an ancestor, wherever the word heir is used in a will, but so limited and restricted as to show the intention of the testator, not to employ the term in its legal signification, as if it be heirs, equally to be divided among them, or heirs then living, or heirs for life as here—the term means children. 8 Petersdorf Ab. 264, tit. Devise; Ib. 165; 4 Dessaus, 459. The word heir construed to mean child. 1 Dall. 4, Ashton *v.* Ashton. Devise to first heir male of J. S. Held, that the first son of J. S. took. The plaintiff is the person who answers this description—he is heir at law of Charlotte. The testator used the word heir in the singular number. He says during its life, referring to one. If heir means child—or the singular number restricts it to one—or the plaintiff answers the description, he would take. But if heir is to receive a technical construction, then if this *devise had been carried out by words of inheritance, or what in a will is equivalent, [*11] such as *in perpetuum*, &c., it would have been an estate tail in Charlotte, and the limitation for life coming in, would give it by designation to such person as would have taken it in tail. "To be her only heir," is equivalent to heirs of her body. Heirs is often confined to heirs of the body. Petersd. Abr. 258; Ib. 267; 1 Cov. & Hughes' Dig. 519, § 5, 6, 7; 3 Binn. 374, Hall *v.* Vandegrift, and cases there cited. So that according to legal construction, the tenant in tail, who here is the same as the plaintiff, would be entitled to take.

But if heir is not to be confined to the heir at common law, then all the heirs or children of children of Charlotte, who would be heirs under our intestate laws, are entitled. In Thompson *v.* M'Clenachan, 17 Serg. & Rawle, 115, Huston, Justice, considers it strange, that since 1684, it should be doubted that heir means such as would inherit by the intestate laws of Pennsylvania.

Scott, for the defendant:—

The daughter took only a life estate; so the devise to her only heir does not create an estate tail as contended by the

plaintiff, because being limited during its life, it expressly excludes the idea of succession.

Haddon's Case, cited Moore, 372, was a devise to one for life, and so afterwards to every person who should be his heir for life only; and it was adjudged to carry an estate in possession to the tenant for life, with a remainder for life to the next heir, and nothing more. Saville, 75; Cro. Eliz. 40; 2 Leon. 35; 6 Rep. 17; 6 Mo. 121; 2 Bulst. 180. To the same point, Preston on Est. 554. In England the words only heir might perhaps be interpreted to mean eldest son. In Pennsylvania, however, there is no reason for putting such an interpretation on these words. Nothing in the history of property, or customs of the people from the earliest day sanction it. Primogeniture was abolished from the first, except so as to give the eldest son a larger share, until 1794. If therefore only heir has any meaning, it must mean all who together take an entire inheritance, and fill the place of an heir. Then we have an estate for life to Charlotte, with contingent remainder to her children for their lives, and a remainder in fee undisposed of, and therefore descending on Charlotte, as right heir of the testator. The effect of this descent was—

1. That the estate in fee vesting directly in the tenant for life, before any child was born, merged the life estate, and thereby vested in her a fee which passed by the conveyance to Davidson. On this point he cited Fearne on Cont. Rem. 264, 241; Cro. Jac. 260; 1 Bulst. 61; Kent *v.* Harpool, T. Jones, 76; Hooker *v.* Hooker, Rep. temp. Hardw. 11; Plunket *v.* Holmes, and Boothby *v.* Vernon, *are distinguishable, [*12] the contingent remainders preserved being estates of inheritance.

2d. The conveyance by Charlotte and her husband to Davidson, created an union and consolidation of the life estate and reversion, so as to destroy the contingent remainder. Fearne on Rem. 247; 3 Preston on Convey. 441. This is the act of the tenant for life and reversioner, and is not subject to the exception set up where the merger is claimed under the meeting of a devise and a descent from the same person, or where the particular estate and the fee are given to the same person by

the same instrument. It is one of the class of cases in which the tenant of the particular estate has the absolute power at his own option to destroy a contingent remainder. This is a power of the exercise of which nobody can complain, because there is nobody to complain, all being in contingency, and a power peculiarly suited to the genius of our institutions.

The opinion of the court was now delivered by

KENNEDY, J.,—who after stating the will and facts proceeded:—It is proper in the outset to inquire what estate Charlotte took under the will; and this will depend upon what was the intention of the testator, which is to be collected from the words of the will itself. Having once discovered his intention, it will be the duty of the court to carry it into effect by their construction of the will, unless found to be repugnant to, or inconsistent with some established principle or rule of law. By the terms of the will, the devise of the land to the daughter is limited to her expressly for life. This limitation, although express, would not perhaps be sufficient to take this devise out of the operation of the rule recognized and laid down in Shelly's Case, seeing there is a remainder overlimited by the will to her heir. Pauly *v.* Lowdall, Sty. 249, 273; Dubber *v.* Trollop, 8 Vin. 233, tit. Devise, U. a. pl. 13; Moore *v.* Parker, Skin. 559; Robinson *v.* Robinson, 1 Burr. 38. But to this remainder to her heir there is also superadded an express limitation for the life of such heir, which goes to show clearly that the testator did not intend by his will to give to his daughter a fee simple estate in the land, but that she should have barely an estate for her life; and that her heir or heirs, whoever he, she, or they might happen to be at her death, should take by purchase a remainder for life also. Besides, if he had intended that his daughter should have the fee in the land, it was unnecessary and useless in him to have made a will for that purpose, because she would have taken it by operation of law without.

The word "heir" then could not have been used here by the testator with a view to set forth the nature and *quantum* of estate intended to be given to his daughter, but for the pur-

[*13] pose of describing *the person who should have the remainder for life in the land after her death. It was meant by him to be understood as a *descriptio personæ*, as in Haddon's Case, where the testator "devised to one for life, and so afterwards to every person that should be his heir, for life only," and it was adjudged in the Common Pleas to carry an estate in possession to the tenant for life, with a remainder for life to the next heir, and nothing more. Cited Moore, 172; and per Wray, C. J. in Manning *v.* Andrews, 1 Leon. 258, "If a devise be made to one for life, and then to his heir for life, and so from heir to heir *in perpetuum* for life, here are two estates for life, and the other devisees have a fee; for estates for life cannot be limited by general words from heir to heir, but by special words they may." Having now shown that the word "heir" in the case under consideration, must be construed a word of purchase and not of limitation, it in the next place becomes material to determine whether the remainder for life given to the heir of the first devisee, was vested or contingent. It is certain that the daughter could have no heir during her life, for the rule of law in this respect is *nemo est hæres viventis*. As no person then could become her heir during her life, it was altogether uncertain who might happen to be her heir at her death. And in Archer's Case, 1 Co. 66, where Sir Francis Archer, having devised lands to his son Robert for life, and after, to the next heir-male of Robert, and to the heirs-male of the body of such next heir-male; and Robert, after the death of the testator, having issue a son, made a feoffment to John Kent, upon whom the son entered, it was held, that the remainder to the next heir-male of Robert was contingent, and could only vest in the son personally, in the event of his surviving his father; for until then he could not be his heir, according to the maxim already repeated: And it was further adjudged, that Robert, by his feoffment of the land, put an end to his life estate under the will, which supported the contingent remainder given to his next heir-male, and consequently thereby destroyed the remainder. So in Moore *v.* Parker, Skin. 559, Roll, Chief Justice, lays it down, "if a devise be to a man for life, and after to his heir, this is

an estate in fee; but if it be to the heirs of such heir, such devise then is a contingent remainder;" the word "heirs" in this latter case being engrafted on the word "heir," renders it as in the case at bar, a *designatio personæ*, or word of purchase, and makes it altogether uncertain during the life of the first devisee, who the person may be that will answer to the description of his heir at his death, and hence the remainder limited to such heir is contingent, on account of the uncertainty of the person who is to take it. From the authorities, then, on this subject, as well as from the nature of the devise over in the case before us, it appears, without any doubt, to be a contingent, and not a vested remainder, limited to the heir of the daughter for life.

The remainder to the heir of the daughter being shown to be contingent, *the next question which seems to present itself is, what effect did the deed of bargain and [*14] sale executed by the daughter and her husband, Jacob Bennett, to William Davidson, conveying the land in fee simple to him, produce upon it. And here it must be recollected, that the daughter being the testator's only child and heir at law, the reversion in fee of the land descended to her at the decease of her father, and continued in her until she and her husband afterwards made the deed of conveyance to Davidson. Now, although, according to the cases of Archer (already mentioned), Plunkett *v.* Holmes, T. Raym. 28, and Boothby *v.* Vernon, 9 Mod. 147, it cannot be considered that such descent of the inheritance from the testator to the party taking the life estate in possession under his will, which also limited the contingent remainder, will create such a union of the two estates as will destroy the contingent remainder; yet it does not follow but that a deed of conveyance made by the party so invested with the life estate and the reversion in fee, may produce that effect. Mr. Fearne, in his essay on Contingent Remainders, p. 343, 3d American, from the 8th London edition, after noticing the cases on this subject, in which there is a seeming difference of opinion, thinks they may be reconciled by taking the distinction, that in cases where the descent of the inheritance is immediate from the person, by whose will the particular estate

and contingent remainders are limited, (as in the cases last cited,) the descent of the inheritance does not destroy the contingent remainders; but in cases where the particular estate and contingent remainders are not created by the will of the ancestor from whom the inheritance immediately descends on the particular estate, (as in Kent *v.* Harpool, T. Jones, 76; s. c. 1 Ventr. 306; Hooker *v.* Hooker, Rep. temp. Hardw. 91;) there the remainder is destroyed. This distinction seems to have been recognized in Crump *v.* Norwood, 7 Taunt. 362, where the case in substance was that of a testator, who devised an estate for life to his nephew, limiting a contingent remainder in fee to the heirs of the body of such nephew, if more than one, to be equally divided among them as tenants in common, but if he should die without such issue, or leaving any such, they should all die without attaining twenty-one, then to his own right heirs. On the testator's dying, one moiety of the ultimate remainder in fee descended to the father of the nephew, being one of the testator's two heirs in gavelkind, and from the father again to his son the nephew and devisee for life of the testator; and held, that by the descent of the fee thus to the nephew, his life estate under the will became merged in the fee, and that the contingent remainder depending upon it for support, was thereby destroyed.

The distinction indeed, taken by Mr. Fearne, seems to be necessary, in order to give some effect to the will of the testator, otherwise in every case where he limits a particular estate for life, to his heir at law, with a contingent remainder over, without any ulterior vested *remainder, the particular estate can never take effect, because the moment it comes into existence it would be destroyed by its union with the reversion in fee, and being thus destroyed, the contingent remainder must likewise necessarily fall with it for want of support. This would, as Mr. Fearne very justly observes, be making the will, in this respect, *ipso facto* void. But still, notwithstanding this distinction may be right in order to give effect to the will, according to the intention of the testator, it does not change the nature of the particular estate, limited by the will, nor render it in any respect dif-

[*15]

ferent from what it would have been, had it been created by any other means. It remains liable in the same manner to the operation of all acts of the tenant for life, at least, if not to all future accidents by which such an estate is generally destroyed; such as forfeiture, merger, &c. Now although the fee in this case descended in such sort to the daughter, as heir, being devisee for life under the will, so as not to confound the estate for life, but to leave an opening for the remainder to come in, upon the happening of the contingency connected with it, yet it appears to me that the operation of the deed of conveyance, made by the daughter and her husband, Jacob Bennett, to William Davidson, was such as to unite and consolidate the estate for life, with the reversion in fee in such manner as to make it one entire estate in fee in the vendee, incapable forever after of being separated or opened so as to let in the contingent remainder, and consequently to destroy it. I do not consider it a sufficient objection to this conclusion, that the intention of the testator as regards the contingent remainder, may be thus indirectly frustrated by it; because it must be presumed that he was acquainted with the law on this subject, as he was bound to know it; and that unless he introduced trustees into his will for the purpose of preserving the contingent remainder, that he left it in the power of the devisee of the particular estate, to defeat the contingent remainder by destroying the particular estate. It might as well be objected that a common recovery suffered, ought not to be held to bar the heir in tail of his right in such estate, where it has been created by will, because it will defeat the intention and frustrate the will of the testator. But the conclusion to which the court has come, in respect to the effect and operation of the deed of conveyance, from the daughter and her husband, to Davidson, is not only sustained by the principles laid down and decided in the cases already mentioned, but the very case itself, is put by Mr. Butler in his notes to Fearne on Contingent Remainders, 322, 3d American from the 8th Lond. ed. where he says, "if a bargain and sale, and lease and release be made to the person who has the immediate vested reversion or remainder, or if the tenant for

life and the immediate remainderman or reversioner join in the conveyance, or the tenant for life who makes the conveyance, has the remainder or reversion, the bargain and sale or lease and release will destroy the remainder. For in [*16] *each of these cases, the conveyance operates as an union or consolidation of the two estates, and the contingent remainder is necessarily destroyed by the determination of the particular estate, on which it depends." The case here last stated is identically the same, with the one before the court. And it will not be denied that a deed of bargain and sale, such as was made by Bennett and his wife, duly acknowledged, certified, and recorded in conformity to our acts of assembly, passed in this behalf, is of as great force and efficacy at least, if not still greater, than a bargain and sale, or lease and release in England. For by our act of the 28th of May, 1715, Purd. Dig. 195, it is enacted that all deeds and conveyances of lands, tenements, and hereditaments in this province, made or to be made, and proved or acknowledged and recorded as therein directed, shall be of the same force and effect here for the giving possession and seisin, and making good the title and assurance of the lands, tenements, and hereditaments, as deeds of feoffment with livery and seisin, or deeds enrolled in any of the king's courts of record at Westminster, are or shall be in the kingdom of Great Britain. And again, by the act of the 24th of February, 1770, Purd. Dig. 197, a deed of bargain and sale, made by a husband and wife of the lands of the wife, when acknowledged and certified in the manner therein prescribed, is declared to be as good and valid in law, to all intents and purposes, as if the wife had been sole and not covert at the time of the sealing and delivery thereof. And though a deed of bargain and sale made by the tenant for life, purporting and intending, to convey the land in fee in Pennsylvania, acknowledged and recorded agreeably to the act of 1715, does not, as has been held, create a forfeiture of the life estate, M'Kee's Lessee *v.* Pfout, 3 Dall. 489, yet I apprehend that according to the very terms of the act, it has all the force and efficacy of a deed of feoffment, accompanied by livery and seisin, for the purpose of assuring and securing to the vendee,

the fee simple estate in the land. The destruction of the contingent remainder in this case, was not, therefore, produced by forfeiture of the particular estate, which supported it, but by the particular estate or vested estate for life, becoming, through the operation and effect of the deed of conveyance from Bennett and his wife to Davidson, so united and incorporated with the fee in Davidson as to be entirely and completely lost and determined. This then being the case, the plaintiff can have no right or claim to the land in dispute.

It was objected that the clause in the will, by which the remainder over is limited, is unintelligible and void for uncertainty. The words of it are, "and then to be her only heir during its life." A devise is never construed absolutely void for uncertainty, except from necessity; for if there be a possibility of reducing it to a certainty it is good. 1 Powell on Devises, (by Jarman,) 370. Hence words in wills have been transposed, supplied, and changed, in *accordance with the context. Ib. 371 in notis. and the cases there referred to. In an anonymous case, 1 And. 33, where a devise was made to A. and the heirs of his body, "and if he should die," then a remainder over was given; and the court supplied the words "without issue," so as to make it read "and if he should die without issue." So in Sheppard *v.* Lessingham, Amb. 122, "without issue," was read "without leaving issue." Also in Kirkpatrick *v.* Kirkpatrick, 13 Ves. 476, the words "under twenty-one" were supplied. And in Keith *v.* Perry, 1 Dessaus. 354, the word "her" was changed by the court into "their." And in like manner "or" has been construed "and," and *vice versa*, in cases almost without number, collected by Jarman in his note to 1 Powell on Devises, 379, 380. Now by supplying the word "to" in the case before us, so as to make the clause containing the devise over read, "and then to be to her only heir during its life," it is rendered perfectly intelligible, as to whose heir was meant, and made to accord with the intention of the testator as clearly disclosed by the context: or by placing the word "heir" in the possessive case, so as to make it read, "and then to be her only heir's during its life," will relieve it from all obscurity, in respect to [*17]

whose heir was intended, and give to it the same meaning as by supplying the word "to" in the manner suggested.

But in regard to the further uncertainty in this clause, as to the person or persons intended to be described by the word "heir," it appears to me, that it presents a question not altogether free from difficulty, whether the testator meant heir at common law, or heirs according to our acts of intestacy. There is nothing, however, in this which could effect the devise on the ground of uncertainty. It presents merely a question of construction, whether the one description of heirs or the other were intended by the testator, and would have to be decided by the court, if it were necessary to determine the cause.

In England, if lands be given either by deed or will to the heirs of a particular person, though they be customary lands, such as gavelkind or borough-english, the heir at common law, is presumed to be meant, unless special words are used to describe the customary heir; but if special words are used the presumption fails, and then it is said that the customary heir shall be preferred, though the subject of the gift should be common law land. Co. Lit. 10 a, and Hargrave's note, 4; Co. Lit. 24, Harg. note 3.

It may be that for the same reason that the heir at common law is presumed to be meant in England, that heirs according to our acts of assembly, ought to be presumed to be meant here in such case. And it would seem, that upon this principle, it was decided in Connecticut in the case of Larabee *v.* Larabee, 1 Root, 555, that under a devise to a man, "and the next male heir of his body," all the sons of the devisee were entitled to take. But in our case it may be thought that the words "only," and "its," which have been *introduced [*18] by the testator, possibly for some purpose, in connection with the words "heir" in the singular number, were meant by him to exclude plurality, and to describe the heir at common law. "To her only heir during its life," are certainly words strongly expressive of unity, and singleness. The word "its," though not very applicable to a person out of the first stage of infancy, is very frequently and properly used in reference to a child of that early age; and it possibly may be,

that the testator when he used it, was thinking of giving the land to the first child his daughter should happen to have, to take as soon as born; or more likely it may have arisen from a want of capacity to commit his meaning in appropriate terms to paper. I need not, however, speculate further on this point, as it is unnecessary to decide in this case, what description of heirs shall be considered as meant in the case of a gift or devise to the heir or heirs of a particular person. I do not know that this question has ever been decided in this state; neither do I intend to intimate an opinion upon it; indeed I cannot say that I have formed any as yet with which I am perfectly satisfied.

Judgment for the defendants.

Cited by Counsel, 2 Wh. 379; 4 W. & S. 194; 8 W. & S. 39; 4 C. 98; 12 C. 118; 1 Wr. 33; 1 S. 507; 32 S. 127; 12 W. N. C. 446.

[Philadelphia, January 12, 1835.]

Yard *against* Cramond, Who Survived Haga, and Another, Assignees of E. & L. Bollman.

IN ERROR.

The decisions of the commissioners under the treaty with Spain, of the 22d of February, 1819, are, upon all matters, both of law and fact, within the scope of their authority, conclusive, and not open to review, either directly or collaterally, by suit.

Quere, whether or not it was the intention of the contracting parties to the treaty, to include all cases of American property traversing the ocean in American vessels, under the protection of the American flag, engaged in lawful commerce, and owned by merchants residing and carrying on trade in any of the ports of the United States, under the sanction of the laws of the United States, whether citizens in the strict sense of the term by birth or naturalization, or in its more extended sense, by domiciliation for commercial and other purposes, and assuming the national character of the country in which they reside.

Where the claims of various persons for indemnity under the treaty, for the loss of cargoes seized and sold in a Spanish port, by order of the public authorities, part of the proceeds of which had been deposited in the Royal Treasury at Lima, and part was due from a Spanish merchant, who had re-

ceived it, were presented to the commissioners by a common agent, from whose memorial and the accompanying proofs it appeared, that three of those under whom claims were made, were foreigners, domiciliated in the United States, and carrying on trade as American merchants, at the time the loss occurred, and were afterwards, and before the date of the treaty, naturalized citizens of the United States; one of them was at the time of the loss, a foreigner, domi-
[*19] ciliated in *the United States, and carrying on trade as an American merchant, but was never naturalized; and all the rest were either native or naturalized citizens of the United States, and the commissioners (after having rejected the first memorial, and receiving another, which supplied the defects of the first), made a decree, by which they allowed the claim as valid for the proportion of the claimants, of the net proceeds of the cargo deposited in the Royal Treasury at Lima, "but declared, that from it must be deducted such sums as are claimed by those who are not citizens of the United States, and also, any sum which is claimed under any person who was not such citizen at the time of the loss:" and by a subsequent decree, after adverting to the previous allowance of the claim as valid, they proceed to ascertain the amount thereof, and award to the claimants a certain sum "in full for the loss sustained in the arrest of these vessels at Callao, by order of the Spanish authorities, and the sale of their cargoes, in 1801," which sum they direct to be paid to the agent, "for himself and others."—Held, that the decision on its face excluded the interests of all those who were not native or naturalized citizens at the time of the loss and of the treaty, and that the decision of the board in other cases in which claims had been made under some of the same persons, that they were citizens within the meaning of the treaty, was not admissible in evidence to show the opinion of the board as to the citizenship of the same persons, in the case before the court.

ERROR to the District Court for the city and county of *Philadelphia.*

The defendant in error, William Cramond, who survived Godfrey Haga and Charles G. Paleske, who, together with himself, were assignees of Eric & Lewis Bollman, bankrupts, brought this action against James Yard, the plaintiff in error, for money had and received by the defendant below, to the use of the plaintiff below, under the following circumstances.

Eric & Lewis Bollman, who were Hanoverians by birth, came to this country in the year 1796, and entered into business as merchants, in the spring of 1797. Eric Bollman married in Philadelphia, in which city and New York he was domiciled until the year 1814, when he went to Europe, and never afterwards returned to the United States.

On the 11th of October, 1802, he was regularly naturalized as a citizen of the United States.

Lewis Bollman married in Pittsburg, and was domiciled in the United States, until his death, which occurred a few years ago. He also was regularly naturalized as a citizen of the United States, on the 11th of October, 1802.

On the 8th of March, 1803, they were both declared bankrupts, and received their certificate of conformity on the 9th of June of the same year.

On the 22d of February, 1819, a treaty of amity, settlement, and limits, was negotiated between the United States of America, and the King of Spain, which was finally ratified and promulgated on the 22d of February, 1821. 6th Laws of U. S. 620. By the second article of this treaty, his catholic majesty ceded to the United States East and West Florida, in consideration of the sum of five millions of dollars, to be applied in the manner directed by the eleventh article of the treaty.

*By the ninth article, the high contracting parties make to each other mutual renunciations. The renunciations of the United States extend, among other things, (in the fourth section,) "to all claims of citizens of the United States upon Spain, arising from unlawful captures or seizures at sea, and in the ports and territories of Spain or the Spanish Colonies." In the fifth section they extend to all claims of citizens of the United States, upon the Spanish government, statements of which soliciting the interposition of the government of the United States have been presented to the department of state, or to the minister of the United States in Spain, since the convention of 1802, and until the signature of that treaty. [*20]

The eleventh article is as follows, viz.:

"The United States, exonerating Spain from all demands in future, on account of the claims of their citizens, to which the renunciations herein contained extend, and considering them entirely cancelled, undertake to make satisfaction for the same, to an amount not exceeding five millions of dollars. To ascertain the full amount and validity of these claims, a commission, to consist of three commissioners, citizens of the United States, shall be appointed by the President, by and

with the advice and consent of the Senate, which commissioners shall meet at the city of Washington, and within the space of three years from the time of their first meeting, shall receive, examine, and decide upon, the amount and validity of all the claims included within the descriptions above-mentioned. The said commissioners shall take an oath or affirmation, to be entered on the record of their proceedings, for the faithful and diligent discharge of their duties; and in case of the death, sickness, or necessary absence of any such commissioner, his place may be supplied by the appointment as aforesaid, or by the President of the United States, during the recess of the Senate, of another commissioner, in his stead. The said commissioners shall be authorized to hear and examine on oath every question relative to the said claims, and to receive all suitable authentic testimony concerning the same. And the Spanish government shall furnish all such documents and elucidations as may be in their possession, for the adjustment of the said claims, according to the principles of justice, the law of nations, and the stipulations of the treaty between the two parties of 27th of October, 1795: the said documents to be specified, when demanded, at the instance of the said commissioners.

"The payment of such claims as may be admitted and adjusted by the said commissioners, or the major part of them, to an amount not exceeding five millions of dollars, shall be made by the United States, either immediately at their treasury, or by the creation of stock bearing an interest of six per cent. per annum, payable from the proceeds [*21] of the sales of public lands within the territories *hereby ceded to the United States, or in such other manner as the Congress of the United States may prescribe by law.

"The records of the proceedings of the said commissioners, together with the vouchers and documents produced before them, relative to the claims to be adjusted and decided upon by them, shall, after the close of their transactions, be deposited in the department of state of the United States; and copies of them, or any part of them, shall be furnished to the Spanish

government, if required, at the demand of the Spanish minister in the United States."

Under the provisions of the articles above recited, commissioners were duly appointed to carry it into effect.

On the 28th February, 1822, Godfrey Haga and William Cramond, assignees of Eric and Lewis Bollman, together with several other persons, gave to James Yard a power of attorney authorizing him to appear before the commissioners and prosecute their claim as owners of the cargo of the brig Dolly, Thomas Webb, master, formerly belonging to the port of Philadelphia, for the capture and loss of said cargo, and generally to do whatever might be necessary to effect a recovery of their claim.

On the 1st of March, 1822, Mr. Yard, in pursuance of this power of attorney, and a similar one from certain claimants on account of the capture of the ship Asia, presented to the board a memorial, in which, among other things, he set forth that he was the agent of his own assignees and of all the other persons originally interested in the transaction thereinafter stated, or of those who represented or claimed under such persons, of all of whom a table was annexed, showing the place of their nativity, the time of their naturalization, when abroad, their residence at the time of the transaction aforesaid, and the character of the claim on the part of each, and whether such claim was original or derivative: That in the year 1799, Don J. Demas y Valle, President or Governor of the Spanish Province of Guatemala, granted sundry licenses to a distinguished merchant of the city of Guatemala, Don Juan Bts. Yrissary, for the importation from foreign ports, especially from the United States, of all lawful merchandise; to render which licenses available he gave passports to Don Alexander Ramirez and Don Juan Echevria, agents of Yrissary, to proceed to foreign ports. They came to Philadelphia and addressed themselves to the memorialist, who, together with certain persons who became associated with him, was induced to make the experiment of carrying one of the licenses into effect. The success of this enterprise induced the memorialist and his associates to enter more extensively into the business. The agents

above mentioned stated that if vessels should proceed to ports of Guatemala, in the Pacific, they might, on their outward voyages, touch and trade at the ports of Chili and Peru before they arrived at Guatemala, which was represented as a great advantage. Adopting this plan, the memorialist and his associates, sent two vessels, the ship Asia and *brig Dolly, both the property of the memorialist, with cargoes to the Pacific. Yrissary sent an agent from Caxidé to Lima, to act as consignee of any vessels which might touch at Peru. The cargoes of both these vessels were furnished by the memorialist and several other merchants of Philadelphia, who made him their sole agent, and who shipped their goods in his name. The Asia sailed from Philadelphia in October, 1800, for Sonsonati in the province of Guatemala, with orders to touch at Lima. The Dolly sailed soon after with orders to touch at Valparaiso in Chili. The Asia, without touching at any intermediate port, arrived at Callao de Lima about the end of January, 1801, and the Dolly, after touching at Valparaiso, also arrived at Callao in June, 1801. When they arrived, the power of the President of Guatemala to grant licenses so broad as those under which they sailed, was denied by the government of Peru. Both vessels were therefore arrested, their cargoes seized and sold under instructions from government, and the proceeds deposited in the royal treasury, but the vessels, after being allowed a small sum on account of freight, were permitted to depart with cargoes, principally on Spanish account, one for Cadiz, and the other for Philadelphia. Though the decrees of the government required the proceeds of the cargoes to be deposited in the royal treasury, yet they were so modified as to admit of their passing through the hands of Yrissary's agents, who were permitted to take possession of them on giving bond to place in the treasury the amount of their appraised value. In this state of things it was determined by the associates of the memorialist that he should go to Spain to petition the king for relief. In 1802 he proceeded to Madrid, and in his own name solicited from the throne, restoration of the property sequestered in Lima. Yrissary had an agent in Madrid at the same time, urging the delivery of

[*22]

the property to him. After a protracted period, a royal order for its restoration was granted, but it was so qualified as to give a preference to neither party, and yet to afford a show of justice to both. This royal order was dated August 29th, 1803, and was addressed to the President of Guatemala, apprising him of the removal of the sequestration and instructing him to pay to the memorialist and to Mr. Forbes, of Jamaica, the balance due to them from Yrissary, and to the latter such balance as might afterwards remain in the treasury. Although the royal order had the force of a law, yet great difficulties arose in ascertaining the amount to be received by the memorialist, and he returned to the United States in order to fix that amount. It was determined by those concerned that the memorialist should prosecute the business in the manner he thought best, and to him it appeared that there was but one course to be pursued, which was to effect a settlement with Yrissary at Guatemala, and to demand payment of the president of that province agreeably to the royal order. The difficulties attending this course were most insurmountable. Strangers are generally *excluded from Spanish ports in time of peace, and even if admitted into the seaports permission cannot be obtained on any terms to penetrate into the interior. [*23] The city of Guatemala, the capital of the province, is situated nearly midway between the Atlantic and Pacific oceans. Its port of entry on the Atlantic is Omoa in the Gulf of Honduras, one of the most pestiferous regions of the globe. To that place therefore no person could go from the United States. A vessel was sent to Omoa with a view to open a communication with Yrissary, but he detained her so long, that the officers and crew all perished, when he sold the vessel and appropriated the proceeds to his own use. For these reasons, the business was prosecuted languidly and all active measures were suspended. Some time in the year 1807, a letter was received by the memorialist, dated Guatemala, September 3d, 1806, signed by the executor of Yrissary, informing him of the death of that gentleman on the 5th of May, 1805, and inclosing an account-current which exhibited a balance in favour of the memorialist of two hundred and thirty-nine thou-

sand one hundred and ninety-nine dollars and one and a quarter rials; but it also advised that an attachment had been laid in Lima, on one hundred and eighty thousand dollars of the funds deposited there by three persons, who had freighted the Dolly, on the ground that she had gone to London instead of Cadiz. The letter also contained an offer to pay the memorialist the balance of fifty-nine thousand one hundred and ninety-seven dollars and one and a quarter rials, provided he would receive it in cocoa at a stipulated price, and would send a vessel to a small port adjacent to Omoa to receive it. A great number of proofs and documents were prepared by the memorialist, as well in reference to the attachment in Lima as to the contested amount in Guatemala. The documents for Lima, together with a power of attorney to Don Juan B. Oyazzabal, were sent out, which ultimately reached their destination. The documents for Guatemala, together with a power of attorney, were sent to the Marquis of Ayzinina, and reached him in due time. A letter from Oyazzabal, dated Lima, November 20th, 1809, informed the memorialist of the removal of the attachment, and one from the Marquis of Ayzinina, dated August 10th, 1809, stated that the dispute with the executors of Yrissary had been referred to the Jueces Arbitrios. Another letter from the same person, dated December 18th, 1813, informed the memorialist that he had obtained judgment and was accompanied by a copy of the proceedings in the case. The estate of Yrissary was declared bankrupt and surrendered to his creditors. In December, 1814, the Marquis of Ayzinina died, and his affairs came into the hands of his brother Juan Fermin de Ayzinina, who wrote two letters to the memorialist, one dated the 18th of July, and the other the 3d of September, 1818. In the first, he announces the removal of all difficulty as to the receipt of the money in the treasury at Lima, about two hundred and two thousand dollars, and offers, when in *possession of it, [*24] to remit the amount in indigo. In the second, he advises of having a decree for the amount of the funds in the treasury at Guatemala, which had been transferred from that of Lima by order of the President of Guatemala. Thus, in

September, 1818, such progress had been made in the business, that it only remained to receive the official order of the President of Guatemala for the payment of the money. At this critical moment, notice of the invasion of Florida and capture of St. Augustine, was received at Guatemala. The agent then suggested to the memorialist certain measures to be taken for the security of the property, which, however, were rendered unnecessary by the treaty with Spain, under which the claim was made. The amount of the claims for the two vessels could not be exactly ascertained, but might be estimated at about three hundred thousand dollars.

The memorial then stated that the cargo of the Asia was divided into twenty-two shares, and held in the following proportions, viz.:

Joshua Sutcliffe,	4 Shares.
Samuel Gatcliffe,	4 "
John Ashly,	1 "
Martin Walker,	1 "
Simon Walker,	7 "
James Yard,	5 "

That the cargo of the Dolly was divided into one hundred and twenty shares, and held in the following proportions, viz.:

William Read & Co.,	40 Shares.
Samuel Mifflin,	24 "
E. & L. Bollman,	15 "
James Yard,	41 "
	120

It then stated the facts connected with the national character, residence, &c., of the different parties interested in the cargoes of the two vessels, of which it is necessary to give the following only:

"Martin Walker came to the United States in 1795; his domicil was in Philadelphia until 1803, when he returned to England—was again in the United States in 1811, 1815, and

1819, and since the latter period has resided in Philadelphia. In 1802, he married a niece of Samuel Griffin, of Williamsburg, Virginia, and is now a citizen of the United States.

"Simon Walker came to the United States in 1694; was married in Philadelphia to Miss Ashly, now resident in Philadelphia with her children: made an assignment in 1802 to John Perot, James Taylor, and John Ashly, for the benefit of his creditors: went to England in 1803, and has since resided there."

[*25] *"Eric Bollman is a native of Hanover, in Germany: came to Philadelphia in 1796, and was domiciled there and in New York until the year 1814, when he went to Europe, and was lately in Santa Fé de Bogota: married in Philadelphia the daughter of Mr. John Nixon: was naturalized in 1802."

"Lewis Bollman, brother of Eric, came to the United States in 1796: was naturalized in 1802: was married at Pittsburg, and died there a few years ago."

The memorial, of which the above is an abstract, was presented to the Board of Commissioners, and on the 15th of June, 1822, rejected.

On the 21st of October, 1822, a supplemental memorial, to remedy the defects of that originally presented, was received by the Board.

In this paper Mr. Yard met the objections to his first memorial in the following manner:

In reference to the first objection, viz.: the illegality of the vessels going to Lima, he said, that although he understood the Board had waived this objection in relation to another Lima case, yet he would state, that in this respect, this case differed from all others. The documents for these vessels were prepared for the ports of Guatemala only: but they had a right to call at any Spanish port on their way. By the Spanish laws of Escala, however, they were not permitted to sell their cargoes unless invited to do so by the local authorities. It was the intention of the shippers by both vessels to do so if permitted. The Dolly touched at Valparaiso and took in refreshments without interruption; but not being permitted to

sell her cargo, proceeded to Lima, where she, as well as the Asia, were detained by the government, not for any irregularity in proceeding to that port, but on the ground of incompetency of the President of Guatemala to grant the license under which the voyage was undertaken.

In reference to the second objection, which was, that the original memorial did not clearly state that the funds were paid into the royal treasury, he averred, after recapitulating some of his former statements, that the funds were actually paid into the royal treasury.

The third objection was, that the claims seemed to be against an individual and not against the Spanish government. This he answered by stating that the claim was upon the government and not upon Yrissary, who was only entitled to what remained after satisfying the claims of the memorialist, Mr. Forbes, and others. It was necessary, however, to settle the account with Yrissary, in order to ascertain the amount due to the memorialist.

In relation to the fourth objection, viz.: That if the funds had been placed in the royal treasury, the memorialist had not sought to obtain them from that source in due time, he stated the following reasons for the delay which took place:

1st. His absence from Spain at the time the royal order was issued.

*2d. His inability to appear either in person or otherwise, at Guatemala, as stated in his original memorial [*26] and other causes, and the consequent impracticability of his coming in contact with Yrissary.

3d. The determination of Yrissary and his executors to protract the final settlement of his account as stated in the original memorial.

4th. A royal order to suspend the payment of all deposited funds, in consequence of Miranda's expedition, &c.

5th. The refusal of the King to permit the memorialist's case to be arbitrated in the Havana, as he prayed, so that he might have attended to it in person; and

6th. The necessity of engaging in a lawsuit in a foreign and insulated country to which he could have no access, and

which is proverbial for the interminable character of its law proceedings.

The memorialist then went at length into facts and reasonings to show why the claim was not and could not have been paid in indigo, as mentioned in the original memorial. He also stated, that in saying in his original memorial that in September, 1818, "such progress had been made in the recovery of the amount adjudged to him, that it only remained to receive the official order of the President of Guatemala for the amount thereof," he relied on the representations of his agent, Ayzinina, who was mistaken as to the ability of the treasury of Lima to discharge the demand of two hundred and two thousand dollars, for which he was to receive the order of the President of Guatemala. He stated a variety of circumstances to show that the offer to pay the admitted balance of fifty-nine thousand dollars in cocoa, was fallacious and merely part of a scheme of fraud. The memorialist added, that he had an interest in these claims arising out of certain agreements between the parties in interest and himself for services to be rendered by him, and concluded with the following averments, viz. :—

1. That his claim was presented to the government, soliciting its interposition, before the signature of the treaty with Spain.

2. That the detention of the vessels, and the sequestration of the cargoes at Lima, were illegal.

3. That the funds proceeding from the sale of the cargoes were deposited in the royal treasury at Lima.

4. That he was not bound to look to Yrissary for the pay ment of his demand, but to the royal treasury.

5. That there was no want of diligence in taking the proper measures to enable him to make the demand on the treasury.

A commission having issued to the city of Washington for the purpose of taking testimony, several depositions and various documents were returned by the commissioners; among others, were the following extracts from the record of the proceedings of the commissioners under the Florida treaty, viz. :

[*27] *"No. 1631. Supt. to 1150. James Yard, for himself and others.

32

[Yard *v.* Cramond.]

"Ship Asia and Brig Dolly."
"Tuesday, 29th July, 1823."

"Upon examination of the testimony filed in support of this claim, the Board are of opinion, that it be allowed as valid for their proportion of the net proceeds of the cargoes of these vessels, deposited in the royal treasury at Lima; from which must be deducted such sums as are claimed for those who are not citizens of the United States; and also any sum which is claimed under any person who was not a citizen at the time of the loss."

"Monday, 16th February, 1824."
"Ship Asia, Peterson. }
"Brig Dolly. }

"The Board having heretofore received, examined, and allowed this claim as valid, this day proceeded to ascertain the amount thereof, and do award to the claimants the sum of one hundred and thirty-six thousand and two hundred and sixty-five dollars, in full, for the loss sustained in the arrest of these vessels at Callao, by order of the Spanish authorities, and the sale of their cargoes in 1801, which sum is to be paid to James Yard for himself (No. 1631) and others. $136,265.96."

On the 19th of June, 1824, a draft on the treasury of the United States issued in favour of James Yard, for himself and others, for one hundred and twenty-two thousand and nine hundred and sixty-five dollars, seventy-two cents, which contained the following statement:

Amount of award, ...	$124,910 46
Deduct as per statement, ...	1,944 74
	$122,965 72

On the draft was indorsed a receipt bearing the same date with that of the draft by James Yard, for its amount.

On the 16th of July, 1824, a second draft issued from the treasury in favour of James Yard, for himself and others, for one thousand four hundred and eighty-six dollars forty cents, which contained the following statement:

Amount of award,			$124,910 46
Wt. No. 489. 19 June, 1824, for	$122,965 72		
Wt. No. 1133. 19 July, "	1,486 40		124,452 12
Suspended,			$458 34

A statement dated April 27th, 1826, and signed by James Yard, *was given in evidence by the plaintiff below, [*28] to whom it was furnished by James Yard, showing the proportions to which the different owners of the cargo of the Brig Dolly were respectively entitled, of the amount awarded to them, on the supposition that E. & L. Bollman were entitled to participate in the benefit of the award, subject to charges, &c. The proportion of E. & L. Bollman was stated to be seven thousand three hundred and thirty-six dollars eleven cents.

Mr. Yard did not resist the claim of the plaintiff, except so far as his commissions were concerned; but defence was taken in his name by the other shippers on board the Dolly, (with the exception of those representing the claims of Messrs. Simon & Martin Walker, which were supposed to be obnoxious to the same objection as that of the plaintiff,) on the ground that the Messrs. Bollman were not citizens of the United States within the meaning of the treaty, and were consequently excluded from the benefit of the award.

On the trial of the cause the counsel of the plaintiff below, having offered in evidence the testimony taken under the commission to Washington, the counsel for the defendants objected to the report of Joseph Forrest, one of the documents returned, and the answer to the second interrogatory. On the objection being made, the evidence was withdrawn for the time by the counsel for the plaintiff. But after having examined several witnesses to prove the domicil and commercial residence of the Messrs. Bollman, and several other matters, which it is unnecessary to state, and after having read in evidence a certificate of the clerk of the District Court of the United States for the Eastern District of Pennsylvania, showing that E. & L. Bollman declared their intention to become citizens of the

United States on the 13th of July, 1798, and were naturalized on the 11th of October, 1802; they again offered the evidence which they had before offered and withdrawn. It was objected to again by the defendants' counsel, but his honour admitted "the written documents tending to show that the commissioners in the cases of the Lenox and Molly did adjudge J. E. Bollman & L. Bollman to have been within the meaning of the Florida treaty, citizens of the United States before they were actually naturalized." To this opinion of the judge exception was taken by the counsel of the defendants below.

The evidence admitted by the court was extracted from the record of the proceedings of the commissioners under the treaty with Spain, and was as follows:—

"Ship Lenox, Green, Master,
No. 616. Ins. of North America,
No. 870. Samuel Mifflin, agent for underwriters. } Claimants.

"This vessel, the property of John Steinmoss, Jr., of Philadelphia, a citizen of the United States, laden with a cargo, the property of John Leamy of Philadelphia, Embeck Henchorff of Hamburg, and *Eric & Lewis Bollman of Philadelphia, sailed from the port of Philadelphia on the [*29] day of 1799, on a voyage bound to Cadiz, St. Lucar, or Gibraltar. In the prosecution of this voyage, she was captured by a British armed vessel and detained near Gibraltar on the 1st of August, 1799. On the fourth day after, she was released by the captors, who put a Portuguese lad on board as passenger. The ship Lenox then proceeded for Cadiz, and while on her passage was, on 6th August, 1799, captured near Cape Spartel by the French privateer L'Eole, Armynat, master, carried into the port of St. Lucar in Spain, and condemned by a French consular court, &c.

"The vessel, freight, and cargo were insured on this voyage by the Ins. Company of North America and sundry underwriters in the office of Shoemaker & Bennett of Philadelphia, for whom Samuel Mifflin, the claimant, is agent, who paid the

sums by them insured, to the assured, as an average loss on the cargo and total on the vessel.

"Report of case by Joseph Forrest, clerk."

"Proceedings of the board,
"Saturday, 5th April, 1823, (Lenox, Green.)
"616. Ins. Co. of North America.

"Upon examination of the testimony in support of this claim, the board are of opinion, that it be allowed as valid for the sums insured, and paid upon the vessel, upon the freight, and upon Leamy's shipment of goods, and also for the proportion of expenses which fell due upon the vessel, upon the freight, and upon the said shipment; from which must be deducted the proper proportion of the sum received of the widow of Maurice Roberts & Co."

"870, Samuel Mifflin, as agent (same vessel).

"Allowed as a valid claim for the sums insured and paid by the underwriters, Provided, the board should hereafter be of opinion that the Bollmans were citizens of the United States within the meaning of the treaty, at the time of the loss of this vessel and cargo."

"Thursday, Feb'y 12th, 1824,"
"Proceedings of the board."
"Ship Lenox, Green."

"The board having heretofore received, examined, and allowed this claim as valid, this day proceeded to ascertain the amount thereof, and do award to the claimants the sum of seventeen thousand and ninety-five dollars sixty-six cents, in full for the loss sustained in the capture of this vessel by the French privateer, L'Eole, Armynat, master, carrying her into the port of St. Lucar, and having her and her cargo condemned by a French consul in 1799, which sum is to be divided as follows, viz.:

[Yard *v.* Cramond.]

*No. 616.	To Ins. Co. of N. Am., . .	$9,245	66	[*30]
870.	Samuel Mifflin, as agent, . .	7,850	00	
		$17,095	66	

Estimated by the board :—			
Value of the vessel, ...	$8,000		
Freight, ...	4,000		
Leamy's cargo, ...	1,500		
Bollman's cargo, ...	7,850		
		21,350	00
Deduct sum received, ...		4,556	18
		16,793	82
Expenses, ...		301	84
		$17,095	66

In the case of the ship Molly, Flinn, master, it appeared from the evidence, taken under the commission to Washington, that on the 26th of February, 1823, the board allowed the claims for losses in this case; but their record declared, that from this allowance was to be deducted "the value of that part of the cargo owned by the Bollmans, should the board be finally of opinion that they were not citizens of the United States within the meaning of the treaty."

On the 6th of February, 1824, the board proceeded as follows:

"Molly, Flinn :—

"The board having heretofore examined and allowed this claim as valid, this day proceeded to ascertain the amount thereof, and do award to the claimants the sum of $194,872.26, (less $765.30 unclaimed,) in full for the loss sustained in the capture of this vessel by several Spanish gunboats, &c., in 1801, which is to be divided as follows, viz.:"

Then followed a statement of the division of the amount awarded, which included the following:

"Unclaimed of Bollmans' interest, $765.30."

"There was no claim put in by the Bollmans, or anybody for them, for their uninsured interest."

"J. F."

After the above evidence had been given, the counsel of those persons who took defence in the name of the defendant, offered in evidence a paper signed, "T. Watkins, Secretary to the late Commissioners," purporting to be a certificate by him, that upon the examination of the books of the commissioners, then in his possession, he found certain matters touching the opinion of the board as to the citizenship of E. & L. Bollman. The evidence offered, was objected to by the plaintiff's counsel, and

[*31] overruled by the judge, *who at the request of the counsel offering it, noted an exception to his opinion.

Much evidence was given on the trial in the District Court, touching the amount of compensation claimed by Mr. Yard, for his services in recovering the fund in dispute, but as no question arising out of it came before this court, it is deemed unnecessary to state it.

The judge was requested to instruct the jury—

1. That the Bollmans' interest is clearly and conclusively rejected by the decision of the commissioners, on the face of their awards.

2. That the term "citizen" as used in the treaty, is to be construed to mean, either the native or naturalized citizen; and that the plaintiff is not entitled to recover on the ground, that the Bollmans are, by reason of commercial residence, to be considered as citizens, within the treaty.

3. That if the Bollmans are entitled by construction to be considered as citizens, so are the Walkers.

4. That if the plaintiff is entitled to recover, it is only the amount of Bollmans' interest, after deducting the amount of the insurance.

In reference to the first point submitted to him, his honour, after having commented upon the proceedings and decrees of the board of commissioners, in the case of the Asia and Dolly, and upon the other evidence admitted by him, explanatory of these decrees, particularly the decrees in the cases of the Lenox and Molly, and giving his reasons for having admitted such evidence, instructed the jury that, "neither on the face of the decrees, nor by any other evidence shown, was he satisfied that the board of commissioners had decided the point against

Justus Eric Bollman and Lewis Bollman, but rather the reverse. The plaintiff, the surviving assignee, was therefore entitled to recover what was justly due to them, and what must be taken to have been recovered and received on their behalf."

Upon the second point he declared to the jury, that "on full reflection and after a careful review of authorities, he was of opinion that Justus Eric Bollman and Lewis Bollman, though certainly not within the letter, were within the purview, within the spirit and meaning of this treaty."

In relation to the third point he informed the jury that he could not instruct them as he had been requested, that "if the Bollmans are entitled, by construction, to be considered as citizens, so are the Walkers," the case of the Walkers not being then before the court. He recommended, however, to the counsel to enter into an agreement (which was done) by which the interest of the Walkers in the funds in the hands of Mr. Yard, should not be affected by the verdict to be rendered in this case, in the event of the suits brought by them or their representatives being successful.

As to the last point his honour directed the jury to ascertain how *much had been received from underwriters on account of this loss, but to find a verdict without deducting it, and the court would lessen the verdict by so much if the underwriters were not entitled to it—if they were, the court would hold the plaintiff a trustee *pro tanto*, and lay hands upon the fund for the benefit of the underwriters. [*32]

The opinion delivered by the court to the jury was excepted to by the counsel of those who opposed the claim of the plaintiff below, and on the return of a writ of error to this court, the following errors were assigned:

1. The court below charged the jury that under the Florida treaty persons were entitled to participate in the fund provided who were commercial residents, although not citizens of the United States by birth or naturalization.

2. The court charged the jury that they had nothing to do with the claim of the Walkers—although the admission of their claims would greatly reduce the amount to be received

by the respective claimants, each of whose share would depend upon the number who should be entitled to participate in the fund.

3. The court charged that all commercial residents were entitled to participate in the fund provided by the Florida treaty, and yet authorized the exclusion of certain persons thus circumstanced, whereby the defendant is made liable to pay a sum of money to the plaintiff which he may be liable to pay over again to other persons.

4. The court below admitted in evidence the return of a commission to Washington with the depositions and documents therein contained.

5. The court rejected the certificate of Tobias Watkins after admitting the documents annexed to the plaintiff's commission to Washington.

6. The judgment of the court below is erroneous, and the plaintiff in error assigns general errors.

The cause was argued at December Term, 1833, by *J. R. Ingersoll* and *Chauncey*, for those who resisted the claim of the plaintiff below, the real plaintiffs in error, and by *Scott* and *Rawle, Jr.*, for the defendant in error, *T.* and *J. Sergeant*, who were of counsel with the nominal plaintiff in error, taking no part in the argument. It was again argued by the same counsel at December Term, 1834, *T. Sergeant*, who had been previously appointed one of the justices of this court, took no part in the decision of the cause, and *J. Sergeant*, the counsel of Mr. Yard did not participate in the argument.

Arguments for the real plaintiffs in error.—1. It seems to be admitted on all hands, that the decisions of the board of commissioners, within the scope of their authority, are final and conclusive. That authority was to receive, examine, and decide upon the amount and validity of the claims presented to [*33] *them. The inquiry then is, 1st, whether, on the face of their proceedings, they have decided upon the claim under the Bollmans, and if they have, whether they have rejected or admitted it.

2. If this does not appear on the face of the proceedings, does the extrinsic evidence admitted by the court below, establish their right under the treaty? To understand the decision of the board, it is necessary to refer to the matter before them and the evidence given in relation to it. The memorial of Mr. Yard sets forth the different interests of the persons represented by him, in relation to some of whom it appears that they were not citizens of the United States, at the time of the loss or subsequently. The Bollmans were aliens born and became citizens by naturalization in 1802, which was after the loss. From the two decisions of the board of 29th July, 1823, and February 16th, 1824, it appears that among the claims presented by Mr. Yard, were those of persons not citizens of the United States, and that these were rejected. Who were the aliens and who the citizens? The Bollmans were clearly not citizens in 1801, when the loss occurred. The decision adopts no fanciful interpretation of the term citizen, but uses it in the legal and only accepted manner in which it could be used by them. It seems then from the face of the decisions that the commissioners have decided the question adversely to the claim of the Bollmans, and if they have, it is not denied that their decision is conclusive.

Extrinsic evidence has, however, been admitted for the purpose of explaining these decisions, the operation of which it is necessary to consider. If there was any ambiguity on the face of the proceedings of the board, the evidence relied upon is not calculated to remove it. The decisions in the cases of the Lenox and the Molly are different in principle from that now under consideration, and there is nothing like the adoption of the principle of the one decision in the other. What is the character of the evidence? It is to prove citizenship *de facto*, arising from commercial residence, not citizenship *de jure*, as the basis of the supposed decision of the commissioners, that the Bollmans were citizens within the meaning of the treaty. Thus, if the defendant in error can prove that they were commercially citizens, he will raise on this foundation an argument, that the commissioners, after having in terms excluded all who were not citizens, but admitted a claim under the

Bollmans in other cases, have necessarily decided on this ground, that they were citizens. To suppose the board have proceeded on any such ground, is to suppose they have done what they had no right to do. Their office was to decide on claims of citizens of the United States, and on the validity of such claims their decision is conclusive. But they had no right to decide that an alien is a citizen, and such a decision would not be conclusive. It would be in contravention to the treaty. They did not and could not give to it so fanciful an interpretation as that of the District Court, that although not within the letter, the Bollmans *were within the pur- [*34] view of the treaty. The language of a treaty is to be carefully scrutinized and to be understood according to its meaning in the state in relation to which it is used. In the 9th and 11th sections the term citizens is used, and not inhabitants, and these are the sections under which the claim is made. The use of the term inhabitants in other sections and in reference to other objects, shows that these terms were adopted with care and discrimination and were not intended to be understood as convertible terms. In the language of all nations the word citizen has a definite meaning, but nowhere is it so clearly ascertained as in the United States, where the term means one who by birth or naturalization has acquired municipal rights; not one, who by commercial residence has become entitled to protection and to certain privileges. The inference from a decision in other cases, different in their circumstances, ought to have no operation in determining this case. The court do not know what the evidence in those cases was. There may have been produced a false certificate of naturalization. But the court do know that the evidence produced in this case proved that they were neither native nor naturalized citizens at the time of the loss. Besides, the claimants in the cases of the Lenox and Molly were insurers who were citizens of the United States, and had paid the loss. They were the real sufferers at the time of the loss, to which the policy related back, and they came within the terms of the treaty. They cited Con. U. S. art. 6, sec. 2; The Venus, 8 Cranch, 253; The Frances, Ib. 335; Arnold *v.* The United

Ins. Co., 1 Johns. Ca. 363; The Pizarro, 2 Wheat. 228, 231; Campbell *v.* Mullett, 2 Swans. 553; Comegys *v.* Vasse, 1 Peters, 211, 212, 216; Duguet *v.* Rhinelander, 1 Caines Ca. in Er. xxv.; Wilson *v.* Marryatt, 8 T. R. 31; s. c. 1 Bos. & Pull. 430; Livingston *v.* The Marine Ins. Co., 7 Cranch, 536; 1st Kent's Com. 163; Vattel, 103, B. 1, C. 19, sec. 220:

2. In reference to the exception founded upon the admission of evidence, by the court below, taken under the commission to Washington, they cited Taber *v.* Perrot, 2 Gall. 565; Baring *v.* Fanning, 1 Paine, 549; Hunt's Lessee *v.* M'Neil, 1 Wash. C. C. R. 70; Stevelie *v.* Read, 2 Wash. C. C. R. 274.

3. They contended that if the claim under the Bollmans was admitted and paid, it was liable to deduction to the amount of the interest insured, which diminished, to that extent, the interest of the claimants.

The questions involved in the other specifications of error, were not argued.

Arguments for the defendant in error.—The main question in the District Court, to which the others were ancillary, was whether or not the claim of the Bollmans had been allowed; for as the treaty gave the commissioners the power to *decide conclusively upon the validity of the claims presented to them, it follows, that if their claim was [*35] admitted, the plaintiff was entitled to recover from Mr. Yard, whether they were citizens or not, and if the claim was rejected, he could not recover, even if they were clearly citizens. The interlocutory decree of July 29th, 1823, allowed the validity of the claim, subject to a deduction on account of foreign interests, without specifying what they were; and the final decree of February 16th, 1824, awarded to the claimants generally a certain sum, which was ordered to be paid to James Yard, for himself and others. This decree making no distinction between foreign and American interests, must be understood to embrace all the claimants represented by their common agent, the doubt as to the citizenship of some of them, having been removed. Those, therefore, who contend that the claim under the Bollmans, was rejected are bound to show it,

independently of the language of the decision. They did not attempt to do so, and this was perhaps enough for the plaintiff below. But it was open to him to strengthen his case, by showing that they were considered citizens by the commissioners, and this he could do, in the first place, by showing that they actually were citizens within the meaning of the treaty, and that therefore, the commissioners must have decided that they were so; and, secondly, that the commissioners actually did so decide, as appeared from their proceedings in reference to those individuals, in other cases of the same character.

The first question then is, whether under the Florida treaty, persons who were neither native nor naturalized citizens, but who were domiciled here, and carrying on commerce as American merchants were entitled to indemnity for losses sustained by Spanish seizure, in the prosecution of their business as American merchants. Nothing is more clear, than that by the law of nations, a man may acquire a national character, and enjoy all its advantages, so far as relates to commerce, not only independently of, but directly in opposition to his original character. In all cases therefore, of prize and insurance, in all cases whatever, in which national character is the subject of inquiry, as connected with commerce, the inquiry is, not to what country the party owes allegiance according to municipal laws, but of what country is he a citizen, or subject according to the law of nations; and this inquiry is fully satisfied, by showing what is his commercial domicil. So far is this principle carried, and so entirely is original national character lost, for certain purposes, by the acquisition of a new commercial domicil, that the courts of a man's native country will condemn his property as enemy property, merely on the ground of his being domiciled in the enemy country. Livingston *v.* The Maryland Ins. Co., 7 Cranch, 507; The Venus, 8 Cranch, 253; The Francis, 1 Gall. 614; Arnold *v.* United Ins. Co., 1 John. Cas. 363; Tabbs *v.* Bendelach, 4 Esp. N. P. Cas. 108; Vattel, B. 2, ch. 6, pp. 251, 252; B. 1, ch. 16, [*36] p. 157; B. 1, *ch. 19, p. 166. Unless then, there is a difference between the words "citizen" and "sub-

ject," as used in reference to cases of prize and insurance, and as used in a treaty, these authorities are conclusive. It is not easy to perceive on what foundation such a distinction rests. It is applied to all persons having a commercial domicil, and extended to all commercial concerns. Domicil stamps national character as to everything connected with commerce, though it does not open the door to immunities and privileges, which depend on municipal laws. In determining the meaning of the word, as used in the Florida treaty, it is proper to inquire what objects it had in view. A number of American merchants, natives, naturalized and domiciled, had large claims against the government of Spain, for the spoliation of their property. Indemnity for the loss of this American property had been the subject of frequent and fruitless application to the Spanish government, and our own government interposed its offices for its recovery. The claims of those interested in the cargoes of the Asia and Dolly, had been the subject of the application of the government of the United States, and no distinction was made between those who were native or naturalized, and those who were domiciled citizens. The property confiscated was American property, because it belonged to American citizens, and was entitled to protection as such. When the treaty of 1819 was formed, the United States exonerated Spain from all such claims, and undertook to satisfy them to the extent of five millions of dollars. By the words of the treaty, our government exonerated Spain from all claims of American citizens; the plain and obvious meaning of which is, that Spain was released from all claims on account of American property, the term citizen being used to signify those who represented such property. Any other construction would be in the highest degree unjust and fruitless, to those who had settled here, confiding in the protection of our government. Their claim on Spain was gone. If it had been made, the answer would have been, that the cession of Florida had extinguished all claims founded on the confiscation of American property. As Hanoverians, the Bollmans could make no claim on Spain, because Spain was then at war with Hanover, and if the property was Hanoverian property, it was

rightfully confiscated. But it would have been in violation of the law of nations to call it Hanoverian property. The only quarter to which they could look, was the government of the United States, in whose protection they had confided, and who were bound to protect their property as American property. It is urged that strict criticism should be applied in construing a treaty, in which every word is weighed and considered. Where shall we be landed, if we construe the word citizen with critical precision? It is defined by the best English lexicographers, to be "a freeman of a city, not a foreigner; not a slave," "a townsman, a man of trade; not a gentleman" —"an inhabitant, a dweller in any place." The meaning [*37] *given of the corresponding Spanish word used in the treaty, *cuidadano*, is "a livery man of a city"—"a freeman who enjoys the privileges of a city"—"an inhabitant of a city." It would be absurd to give the term the same signification, in reference to every subject. If there be any instrument to the interpretation of which the principles of the laws of nations peculiarly apply, it is a treaty, with which the municipal law has nothing to do. The 11th section of this treaty makes the law of nations, and the stipulations of the treaty of 1795, the rule of interpretation, and the 15th section of the treaty of 1795, when applied to that of 1819, shows that citizens by domicil were included. To show the idea attached by the English courts to the term citizen, when used in a treaty, the case of Maryatt *v.* Wilson, 1 Bos. & Pull. 430, will be sufficient. This was not a case of prize of war, but of citizenship; under a treaty authorizing citizens of the United States, to trade to British ports in the West Indies, from which British subjects, except the East India Company, are rigorously excluded; yet a native British subject was considered as having so entirely changed his national character by commercial domicil, as to be within the terms of the treaty. Though the parties in that case are spoken of, as adopted or naturalized citizens of the United States, yet it nowhere appears that they had become so otherwise than by domiciliation; and even if they had been regularly naturalized under the laws of the United States, that would not have af-

fected the principle, since nothing is more notorious than that Great Britain never permits a subject entirely to put off his allegiance, though, in common with all other civilized nations, she permits him to divest himself of national character, so far as to become a foreign merchant, and enjoy all the privileges incident to that character. Qualified commercial citizenship, in a foreign country, she recognizes in her subjects, complete municipal citizenship, she does not. It is clear then, that the intention of the contracting parties was, to extend the benefit of the treaty to all who bore the character of commercial citizens, whose interests the United States were bound to protect, because their property was American property.

But there is abundant evidence to show that the board considered the Bollmans citizens, within the meaning of the treaty, and that evidence was competent. The cargoes of the Asia and Dolly, were not the only ones in which they had an interest. They had interests in those of the Lenox and Molly, and claims were presented by persons in whom those interests were vested. When these cases first came before the board, they made an interlocutory decree, as in the case of the Asia and Dolly, allowing the claim, provided they should be of opinion, that the Bollmans were embraced by the treaty. Having satisfied themselves on that subject, they afterwards allowed the whole claim, which they apportioned among all the claimants, including those who claim under the Bollmans. The final decrees *in these cases were given a few days before that of the Asia and Dolly came up for final adjudication. [*38] Having settled the principle in these two cases, under circumstances precisely similar, they of course applied it to the case before them. If it be said that their interests had passed into the hands of insurers, who were citizens, the answer is twofold. In the first place, the commissioners were to look to the original character of the claim, without regard to those in whom it had become vested; Comegys *v.* Vasse, 1 Peters, 211; and in the second place, the interest of the Bollmans in the cargoes of the Asia and Dolly, had passed to assignees, who were citizens, for the benefit of creditors, who were also citizens.

Was the evidence to prove this fact admissible? The only evidence admitted by the District Court, was the record of the proceedings of the commissioners in the two cases referred to. No parol evidence was offered or received. The report of Forrest, the regularly constituted agent of the board, was strictly part of the record. The argument that the decision in those cases, is between other parties, loses sight of the peculiar character of the tribunal, and the object for which the evidence was offered. Though possessing a judicial character, the board do not resemble an ordinary court of law, in which one party impleads another, and the judgment given affects themselves alone. It was a court of peculiar and exclusive jurisdiction. Before the board all the claimants under the treaty were parties to all the cases, and it was the interest of each to exclude the others, the fund to be distributed being inadequate to the payment of all the demands upon it. It was a proceeding *in rem*, upon the fund, and in such case, the decision binds all the world. 1 Phil. Ev. 248, (267;) Gelston *v.* Hoyt, 13 John. 561; 1 John. Ch. R. 543; 1 Phill. Ev. 254, (273,) 231, (251,) 233, (253,) 234, (254,) notes; Stark. on Ev., pt. 2, 115, 167, 173, 176; Ib. pt. 4, 1300, Geyer *v.* Aguilar, 7 T. R. 681. It is to be observed, too, that the evidence was not offered as the basis of the plaintiff's claim, against the defendant, nor for any of those purposes for which evidence is usually offered, but to show the decision of the board, upon the construction of a treaty; to show that they had fixed a principle by which all cases of analogous character were to be governed.

The opinion of the court was delivered by

Rogers, J.—This is an action of *assumpsit*, for money had and received, brought by Cramond, the surviving assignee of Eric and Lewis Bollman, to recover their proportion of the sum of one hundred and thirty-six thousand two hundred and sixty-five dollars, awarded by the commissioners under the Florida treaty, to James Yard, and others. The following extract, from the record, contains all that properly belongs to the case.

"Proceedings, in the case of James Yard, claimant on account of the cargoes of the ship Asia and the brig Dolly, before the *commissioners under the treaty between the United States and Spain. [*39]

"The memorial No. 1150, was filed the 20th February, 1822. This memorial was examined by the board, on the 15th June, 1822, and rejected.

"On the 21st October, 1822, a supplemental memorial was filed, No. 1631, and with the original memorial, received on that day by the board.

"On Tuesday, 29th July, 1823, the following proceedings, among others, took place.

"No. 1631. James Yard, for himself and others—ship Asia and brig Dolly.

"Upon examination of the testimony filed in support of this claim, the board are of opinion, that it be allowed as valid, for their proportion of the net proceeds of the cargoes of these vessels deposited in the royal treasury at Lima, from which must be deducted such sums as are claimed for those who are not citizens of the United States, and also any sum which is claimed under any person who was not such citizen at the time of the loss."

On Monday, 16th February, 1824, the board proceeded as follows:

Ship Asia, Peterson.
Brig Dolly.

The board having heretofore received, examined, and allowed the claim, as valid, this day proceeded to ascertain the amount thereof, and do award to the claimants, the sum of one hundred and thirty-six thousand two hundred and sixty-five dollars, in full, for the loss sustained in arrest of these vessels at Callao, by order of the Spanish authorities, and the sale of their cargoes in 1801, which sum is to be paid to James Yard, for himself and others, $136,265.96.

It is conceded by the defendant in error, and but faintly denied by the plaintiff, that the decree of the commissioners is conclusive, and of course not open to review, either directly or collaterally by suit. Independent of the authorities cited, on

the conclusive nature of such decrees, the treaty itself furnishes evidence that such was the intention of the contracting parties. The United States exonerating Spain from all demands in future, on account of claims of citizens, &c, and considering them entirely cancelled, undertook to make satisfaction for the same, to an amount not exceeding five millions of dollars. To ascertain the full amount and validity of these claims, a commission to consist of three commissioners, citizens of the United States, were to be appointed by the President, &c., which commissioners were to meet at the city of Washington, and within the space of three years from the time of their first meeting, to receive, examine, and decide upon the amount and validity of all the claims included within the descriptions mentioned in the

[*40] *treaty. The commissioners were required to take an oath or affirmation, to be entered on the record of their proceedings, for the faithful and diligent discharge of their duties, &c. They are authorized to hear and examine on oath every question relative to said claims, and to receive all suitable authentic testimony concerning the same. It is required that the payment of such claims as may be admitted and adjusted by the commissioners, to an amount not exceeding five millions, shall be made by the United States, either immediately, &c., or by creation of a stock bearing interest, &c. The record of the proceedings of the commissioners, together with the vouchers and documents produced before them, relative to the claims to be adjusted and decided upon by them, shall after the close of the transactions be deposited in the department of state of the United States; and copies of them, or any part of them, shall be furnished to the Spanish government, if required, at the demand of the Spanish minister, in the United States.

By this summary of powers and duties of the board, it will be seen that the commissioners are invested with full and plenary authority to decide every question, as well the amount as the validity of the claims included in the treaty, whether the matter in dispute arises from objections as to the fact, or the law. The commissioners are ordered to keep a record of their proceedings, which together with the documents are ordered to

be filed in the office of the secretary of state, as well for the use and inspection of the Spanish government, as of our own. There is nothing in the treaty which countenances the idea, that either party can resort to the ordinary tribunals of the country, to alter or control the decisions of the commissioners. It would then be an assumption of authority on the part of this court, to attempt to review the decision of this tribunal created by the contracting parties, for the speedy and final adjustment of all claims preferred under the treaty. It is then plain, that the principal, if not the only point, is to ascertain from the lights we have, what was the decision of the commissioners, for whether right or wrong, in law or in fact, is immaterial, as we have no power to examine and correct the mistake, if any exists. Notwithstanding this, however, the plaintiff's and defendant's counsel invoke the aid supposed to be derived from the interpretation of the treaty of the 22d February, 1819. They both claim the benefit of the presumption, that the commissioners have decided as they ought to have decided. For explanation of the decree, they have gone into an extended and able examination of the meaning of the term, "citizens" of the United States, used in the treaty as descriptive of the class of persons entitled to the benefit of the fund. It is contended on the one hand, that the interpretation of the word citizen, is to be settled, not by its definition, in a merely municipal sense, but as it has been, and ought to be interpreted by the law of nations, and the decisions of the courts of prize. That it was the intention of the contracting *parties to include all cases of American property traversing the ocean, in an American vessel, [*41] under the protection of the American flag, engaged in a lawful commerce, and owned by merchants residing and carrying on trade in any of the ports of the United States, under the sanction of the laws of the United States, whether citizens in the strict sense of the word, by birth or naturalization, or its extended sense, domiciliated for commercial and other purposes, and assuming the character of the country in which they reside.

On the other hand, it is insisted, that by the term citizen,

must be understood citizen, in the strict sense of the word, as known to the constitution and laws of the United States. That the provisions of the treaty, are for citizens of the United States, and the subjects of Spain, and that we must resort to the laws of each country, to know what they respectively meant by citizens and subjects. That a citizen of the United States, must be either native or naturalized, and that subjects of Spain, are those who owe her full and not temporary allegiance. That a commercial resident is not embraced, either within the words, or the spirit of the treaty. The point is of great importance, and not without difficulty, but as a decision of the question is not absolutely required, I am instructed to say, that the court do not wish to be considered as having formed any opinion upon it. It is deemed most prudent to decide the question when it directly arises, and not, as in this case, for the benefit of a presumption, which, whatever might be our sentiments in regard to it, would not alter the judgment in this cause.

The principal question, arises from the answer of the court to the defendant's first point, "that the Bollmans' interest is clearly and conclusively rejected, by the decision of the commissioners, on the face of their awards." To this point, I shall now direct my attention, and shall proceed to examine the nature and extent of the sentence, or decree of the commissioners on the claims represented by Mr. Yard, arising out of the seizure of the cargoes of the ship Asia and brig Dolly. Did the commissioners include the claim of indemnity, made on account of the Bollmans and the Walkers? If the claims were disallowed, with or without reason, there is no pretence to say, the plaintiff can recover in this suit, for the award is the foundation of their action. And however we may regret the situation in which the error of the commissioners may have placed the parties, we cannot afford the necessary redress. In the interpretation of these decrees which are, it must be admitted, wanting in precision, we must refer to the matter which was before the board; and this appears from the memorial, and the documentary evidence filed in pursuance of the directions of the treaty, and which form part of the proceedings.

The claim for the whole interest in the Asia and the Dolly, was made by Mr. Yard, in virtue of a letter of attorney, from the persons interested in the cargoes. The memorial stated the different interests of the parties concerned, together with the *national character of the individuals, whom he represented. That the Bollmans were aliens born, and [*42] had been naturalized in 1802, a time subsequent to the loss. That the Walkers were also aliens born; that one of them had never become a citizen, but that the other had; and that all the other claimants were either natural born, or had been naturalized previously to the loss. The memorial of Mr. Yard also showed, that the claim was divided into two parts. One for the money which was deposited in the royal treasury at Lima, amounting to upwards of two hundred and two thousand dollars, the other, for a sum due from a Mr. Yrissary, which he had received out of the proceeds of the sale of the cargoes of the Asia and the Dolly. The first memorial was rejected, but the second, which contains a full and able examination of the whole case, was received; but still it is apparent that two objections remained, the one to the claim on account of the money due from Yrissary, the other an objection to the national character of the Bollmans and the Walkers. Of this, we cannot entertain a doubt, for they alone came within the description of commercial residents; the others, without exception, were either native born, or naturalized citizens. With these representations, the proof accompanying them, and the question of national character for decision, the commissioners decreed, "that the claim is valid, for their proportion of the net proceeds of the cargoes of these vessels, (Asia and Dolly,) deposited in the royal treasury at Lima, from which must be deducted such sums as are claimed by those, who are not citizens of the United States; and also, any sum which is claimed under any person, who was not such citizen at the time of the loss."

The commissioners decree, that the claim, viz., Mr. Yard's claim, is valid, (it must be recollected, the whole claim was at first rejected,) but they confine the award to the sum deposited in the royal treasury at Lima, excluding that part of the claim made by Mr. Yard, on account of the money received by Yris-

sary. If the decree had stopped here, who could have doubted the intention of the commissioners, to include the Messrs. Bollmans and Walkers? But unfortunately for them, the decree contains an exception, which is senseless, unless it is construed to embrace their case. For it proceeds to say, "from which must be deducted such sums as are claimed by those who are not citizens of the United States; and also, any sum which is claimed under any person, who was not such citizen at the time of the loss."

The question has been asked, to which no satisfactory reply has been given, why except from the benefit of the fund, those who are not citizens of the United States, unless it was intended to exclude those who were not citizens, in the strict municipal sense of the term. Why introduce any exception into the decree at all, unless it was designed to exclude the claim of the Bollmans and the Walkers, whose claims alone are included within the exception, and to whose demand after the presentation of the second memorial, alone objections [*43] *were made. A sum was claimed by and for the Walkers, one of whom was not then a citizen, and the other was not at the time of the loss, and a sum was claimed by the assignees of the Bollmans, who were not citizens at the time of the loss. The sentence of the commissioners has a direct and special reference to these claims, and to none other; and to give the decree any other construction, we must suppose that the commissioners used language without meaning, and inapplicable to the case before them.

The decree, it must be remarked, is in its nature interlocutory, and not final. It was necessary for the commissioners, in addition to an order, as regards the right of the different class of claimants, to settle the amount to which Mr. Yard, as the representative of the persons whose claims were allowed, was entitled. In pursuance of this further duty, on the 16th of February, 1824, the commissioners made a final award as follows:

"The board having heretofore received, examined, and allowed the claim as valid, this day proceeded to ascertain the amount thereof, and do award to the claimants, the sum of one

hundred and thirty-six thousand two hundred and sixty-five dollars, in full for the loss sustained in the arrest of these vessels at Callao, by order of the Spanish authorities, and the sale of their cargoes in 1801; which sum is to be paid to James Yard, for himself and others."

If the interpretation of the interlocutory decree be correct, there is nothing in the final decree, which does, or purports to interfere with that interpretation. It is in no part intimated, that a re-examination and change of opinion on the part of the commissioners, had taken place, but, on the contrary, the former decision is made the basis of the final award. The commissioners refer to and incorporate their first order in the final decree, in language which cannot be mistaken. It is inconceivable, that in an affair of such magnitude, if the minds of the commissioners had undergone a change on the legal point, whether a commercial resident was embraced by the treaty, something should not appear on the record of their proceedings, indicative of such change of opinion. The former order is expressly referred to, and confirmed, so as to constitute but one decree, and these decrees are in the most perfect harmony with each other. Nor does the use of the word "claimants," invalidate this construction. That word, if we give language its ordinary import, has reference to those, who before had been decided to be lawful claimants, and citizens of the United States, in a municipal sense. The conclusion to which the court has come, is strengthened by the fact, that the amount claimed by Mr. Yard, deposited in the royal treasury at Lima, is upwards of two hundred and two thousand dollars. It does not appear, that any reason was alleged for the reduction of that amount, except the disallowance of these claims, and yet we find, that the board allowed only one hundred and thirty-six thousand two hundred and sixty-five dollars, which is about the sum Mr. Yard would be *entitled to receive, after deducting the amount claimed, on account of the Messrs. Bollmans and the Walkers. [*44]

It is in vain, then, to allege that it is ungenerous to refuse them a participation in the fund. It would be a manifest wrong that they should be paid at the expense of the other shippers.

If the Bollmans have been injured, it is not by the other claimants, but by the sentence of the tribunal, whose duty it was to receive, examine, and settle all conflicting claims, and to whom full power was committed, to decide all questions of law and fact.

This opinion of the court disposes of the whole case, and thus dispenses with the necessity of a minute examination of the principles of evidence, ruled at the trial. The evidence was admitted for purposes of explanation, but as the proceedings do not need the aid of extrinsic evidence, it was clearly inadmissible on that ground. But in addition to this, there is no principle better settled, than that a judgment or decree of a court is evidence, in another suit only, as against parties and privies. But it is said, that this was a proceeding *in rem*, and as such binding on all parties. And in one sense this is true, but this cannot make the proceedings in another case, between other parties, and under different circumstances, evidence, to control the plain import of the decree itself.

Judgment reversed.

Cited by Counsel, 5 Barr, 79

[PHILADELPHIA, JANUARY 12, 1835.]

Wood *against* Earl.

IN ERROR.

An award of referees finding a certain sum to be due to the plaintiff on a certain day between the date of the submission, and the time of finding the award, "exclusive of the outstanding debts on the books of C. E. (the defendant), arising from sales of the produce of Millville Furnace," is certain and final to a common intent, and therefore good.

THIS was a writ of error to the District Court for the city and county of *Philadelphia*, in an amicable action, in which David C. Wood, the plaintiff in error, was plaintiff, and the defendant in error, Clayton Earl, defendant.

It was submitted to referees under the act of 1705, by an

agreement dated July 25th, 1821, and filed August 6th, of the same year.

*On the 6th of December, 1826, the referees filed their report, in the following words: [*45]

"We the undersigned, having heard the parties, examined their accounts and vouchers, do award to David C. Wood, plaintiff, one hundred and nineteen dollars and seventy-two cents, due on the 19th of sixth month (June), last, exclusive of the outstanding debts on the books of Clayton Earl, arising from sales of the produce of Millville Furnace.

"Philadelphia, 11th mo. 28th, 1826."

Sixteen exceptions to the report were filed in the court below, by whom they were all dismissed, and judgment entered on the report.

The following exceptions only, were insisted on in this court:

1st. The referees erred in reporting the amount due, upon the 19th of June last, which was not the subject submitted to them, and the award is neither certain nor final.

2d. The referees erred in reporting the sum due, "exclusive of outstanding debts," without designating those debts, or signifying to whom they should belong.

3d. The referees erred in making an award, which was neither certain nor conclusive in its character

Rawle, Jr., and *J. R. Ingersoll*, (with whom was *D. P. Brown*,) for the plaintiff in error.

W. Smith and *Chauncey*, for the defendant in error.

Per Curiam.—Were the precise point in Young *v.* Reuben, 1 Dall. 119, now before us, that case would not be recognized as a precedent. There has been since its day, a progressive liberality in the interpretation of awards, which has placed them on a level with other writings. But the award here is of a sum presently due, the reference to a day passed evidently being for purposes of calculation. As to the supposed reser-

vation of debts due on the books, that was evidently to show that the manager was not charged with them, and that they were to be collected by the owner of the works for his own use. The award was therefore certain and final, to a common intent.

Judgment affirmed.

Cited by Counsel, 13 W N. C. 544
Cited by the Court, 1 N. 439

[*46] *[PHILADELPHIA, JANUARY 12, 1835.]

Swift *against* The Union Canal Company of Pennsylvania.

IN ERROR.

An action was brought by a holder of "old stock" in the Union Canal Company of Pennsylvania, to recover the arrears of an annual interest of six per cent, arising from the avails and net proceeds of the lottery pledged as a fund for the payment of said interest by the 3d section of the "act supplementary to an act entitled, an act to incorporate the Union Canal Company of Pennsylvania," passed 29th March, 1819.

Held, that there was no debtor to be sued—no fund liable when the suit was brought, and that the plaintiff could not recover.

THIS was an action to recover the arrears of an annual interest of six per cent. due to the plaintiff, a citizen of the United States, on twenty-nine shares of what is commonly called "old stock," or as they are described in the act of 29th March, 1819, which were not forfeited in the late Delaware and Schuylkill, and Schuylkill and Susquehanna Canal Companies.

The cause was tried before Rogers, J., at Nisi Prius, on the 5th December, 1831, and a verdict taken for the plaintiff generally, subject to the opinion of the court on the evidence.

The several acts of assembly touching the question, are so fully stated in the opinion of the court as to render it unnecessary here to repeat them.

[Swift *v.* Union Canal Company.]

The case was argued by *Read* and *Chauncey* for the plaintiff, and *Biddle* and *Sergeant* for the defendant.

The opinion of the court was delivered by

HUSTON, J.—This suit was brought by the plaintiff, who was one of the holders of what is called "old stock" in the Union Canal Company, to recover from the said company the arrears of an annual interest of six per cent., alleged by the plaintiff to be due at the time of commencing this suit.

To understand the nature of this claim, we must refer to several acts of assembly:—The first is dated the 29th of September, 1791, entitled "an act to incorporate a company for opening a canal and lock navigation between the rivers Schuylkill and Susquehanna," &c., &c., and in pursuance of it a company was organized, called the "President, Managers, and Company of the Schuylkill and Susquehanna Navigation."

On the 10th of April, 1792, another act was passed, and in pursuance of it a company was incorporated under the name of "the *President, Managers, and Company of the Delaware and Schuylkill Navigation." [*47]

It will not be necessary to examine the provisions of these acts, nor to do more than to refer to the act of the 17th of April, 1796, authorizing each of these companies to raise a sum by way of lottery, to assist in carrying on the different works. Then followed the acts of the 7th of March, 1797—23d of March, 1802—1st of March, 1806—17th of March, 1806—4th of March, 1807—20th of March, 1810—all of which were repealed and supplied by the act of the 2d of April, 1811. This act was passed at the instance of the stockholders in the two before mentioned companies, who had by articles formed a joint stock, and by that act were incorporated under the name of "the Union Canal Company of Pennsylvania;" and under this name the company still exists and holds all its rights and privileges.

By this act, such citizens of the United States as were holders of stock, and had then completed the same, were to be holders of stock in the Union Canal Company; and the president and managers were directed to issue and deliver to the

said stockholders, two shares in the Union Canal Company for each share in the Schuylkill and Susquehanna Company, and one share in the Union Canal Company for each share in the Delaware and Schuylkill Company. Provision was made for those who did not choose to accept shares in the Union Canal Company. Very little was done under any or all of these acts, and that little was totally useless to the world and the stockholders, because nothing was completed, and no funds or prospect of funds to go on with it; all operations had ceased. On the application of the stockholders, another act passed on the 29th of March, 1819, which after reciting the hopeless situation of the company, and the importance of the work, authorized commissioners to open books for the subscription of two thousand five hundred additional shares in the Union Canal Company, and pledged the proceeds of a lottery for the payment of an annual interest of six per cent. on all sums subscribed under this act, reckoning from the day of payment of each individual, and then proceeded to enact in the 3d section, "and whereas, it is just and right to put on the same footing the shares which were not forfeited in the late Delaware and Schuylkill, and Schuylkill and Susquehanna Canal Companies; it is hereby declared to be the intent of this act, that the holders of all such shares, as soon as two thousand five hundred shares shall have been subscribed under this act, shall be entitled to an annual interest reckoning from the time of such subscription, in proportion of the payment made on subscribing by the new subscribers, and of the payment of their respective instalments as called for by the board of managers." At this time active proceedings on the canal had long ceased. It also provided for reorganizing the company, and all property purchased or held by either of the preceding companies *or [*48] by the Union Canal Company, or which should be acquired by it, by lottery or otherwise, was to be vested in the old and new subscribers in common, in proportion to the shares of each.

No stock was taken under this act, and the situation of the old stockholders was not improved. It was not within their own power to improve it, and they again applied to the legisla-

ture, and on the 21st of March, 1821, was passed "an act for the improvement of the State." This provided that as soon as two thousand two hundred and fifty shares were subscribed under the act of 1819, the governor should subscribe two hundred and fifty shares on behalf of the state and draw on the state treasurer for the instalments, in proportion as other subscribers paid on the calls to be made by the managers; "and if the proceeds of the lottery granted to the Union Canal Company, together with the tolls which may be collected, shall not hereafter for the period of twenty-five years, yield a sum equal to an annual interest of six per cent. upon all sums not exceeding in amount four hundred and fifty thousand dollars, which may be subscribed by new subscribers as aforesaid, and paid according to law to the capital stock of said company, the governor shall from year to year for the term of twenty-five years, whenever it shall appear to his satisfaction that such disability exists, draw his warrant on the state treasurer in favour of the said board of managers, for the amount of such deficiency, which money shall be applied to the payment of an annual interest of six per cent. to said new subscribers, and the faith of the commonwealth is hereby pledged for the term of twenty-five years, for the full and punctual payment of said interest, provided that the subscriptions shall be paid in such instalments as shall be called for by the managers of said company, and each subscriber shall be entitled to interest only from the time of the actual payment of such instalment, respectively; and in order to avoid as far as possible all disability to pay such interest, so much of the third section of the act aforesaid as pledges any portion of the avails or net proceeds of the lottery aforesaid, to the payment of an annual interest to the holders of shares not forfeited in the late Delaware and Schuylkill, and Schuylkill and Susquehanna Companies, be and the same is hereby suspended, until the canal shall be completed; and the president and managers of said company shall be, and are hereby authorized to continue during the said term of twenty-five years, to raise by way of lottery any sum that may be wanted for the purpose of paying to the holders of said stock the six per cent. as aforesaid:" and then

provides that when the tolls shall amount to six per cent. on all stock, the lottery privilege shall cease, &c., &c.

Under this law the stock was sold; managers and officers chosen, and the canal completed. The old stockholders were the applicants to the legislature for all these successive laws, and they either suggested or agreed to all the several legislative provisions, as well *those in prior acts as in the last one. At their instance, no doubt, provision in their favour was introduced into section third, of the act of 1819; and in their despair of ever receiving anything for their stock, or in their confidence of speedy relief from the proceeds if the stock were taken, they either suggested, or if not, certainly agreed to, the provisions of the act of 1821. By that act, all proceeds from tolls and from the lottery, were pledged to pay interest on the new stock for twenty-five years; and the faith of the state was pledged to make up out of the public treasury, six per cent. interest, on all the new stock for twenty-five years. And further, it was expressly provided, that the third section of the act of 1819, should be suspended, so far as it directed interest on the old stock, until the canal was completed; in other words, the old stockholders were not to have interest until the canal was completed. Probably both the legislature and the old stockholders believed that the tolls and the lottery would from that time, pay interest on every description of stock, and it is provided that if tolls alone are not sufficient, the lottery may be continued to raise money to pay interest to old as well as new stockholders; but let it be noticed, that the state was not pledged to pay such interest, its payment was left to depend on the tolls and the product of the lotteries. It happened that the amount subscribed on the twenty-five hundred shares did complete the canal; and the board of managers who represented, and whose acts bound old stockholders as well as new, resolved to borrow money to complete the work, and to induce capitalists to loan, they pledged—

[*49]

1st. The accumulation on lotteries not already pledged, for payment on the subscription of 1821;

2d. The right to raise ultimately by lottery, the residue of

four hundred thousand dollars, originally granted by the legislature;

3d. The works already accomplished at the cost of four hundred thousand dollars;

4th. The works as they proceed hereafter, and the tolls arising from the whole.

Money was borrowed in pursuance of the resolution on these terms, and at several subsequent times, amounting in all, to four hundred thousand dollars, and upward, all on the same or similar pledges. The right to borrow, and the necessity to borrow are not disputed. The acts of the board of managers were the acts of all stockholders, and equally binding on all, whether new or old stockholders; but the terms of the resolution made or rather continued, a marked difference between the new and old stockholders. The subscribers in 1821 partook of the character of lenders, to whom interest was guaranteed by the state, full as much as the character of stockholders. The tolls and proceeds of the lottery were pledged to them for twenty-five years, and in addition, the state treasury was pledged on the faith of the state for *any deficiency. [*50]
The situation of the old stockholders was essentially different; their interest was suspended until the canal was completed; and then the tolls and lottery, after paying the new subscribers, were to be applied to the payment of the old stockholders. But the amount raised on the new subscription did not complete the canal, and to complete it money was borrowed, and all pledged to pay interest on the loan which could be pledged. I have said the old stockholders were bound by these terms; they were parties to them. Without raising more money, no benefit would have accrued to them from the canal. But the state was bound for interest to the new subscribers for twenty-five years; as after the canal was completed the tolls were expected to be, and might have been sufficient to pay six per cent. on the old and new stock, and if it was not, the lottery was to be continued, and the proceeds from it in aid of tolls to be applied to pay old stockholders; but there was no engagement by the state, that any interest should accrue to the old stockholders, even after the canal was completed. The

loan agreed to by themselves, and for their benefit, intercepted proceeds from tolls and lottery. There is no fund to pay them interest, and no person natural or artificial is bound to pay them.

Throw away the guaranty of the state to new stockholders, and how does the matter stand? A company is formed of subscribers, each of whom expects when the work is completed, to derive from the profits an annual sum equal to interest on the money paid; but before the work is completed, they discover their capital will not complete the work, and they agree to borrow, and pledge the whole proceeds to pay interest on the loan; when completed it will not pay interest on the loan, and interest on capital paid in. To whom can stockholders look for the deficiency? Who is to be sued? Who is liable? Is it not a case of loss? The act of 1821 made a difference in favour of new stockholders, but none in favour of the old, from the common case—except that it continued the lottery, if necessary; but it guaranteed nothing further to old stockholders—there was then no debtor to be sued, no fund liable when this suit was brought, and the plaintiff cannot recover. The old stockholders are precisely in the situation in which the new stockholders will be after twenty-five years have expired; then all will draw equally, and receive or not receive dividends, according as the canal is or is not productive. The law of 1821 makes the difference at present.

But it was said, we might decide that when the proceeds exceeded interest on loans, and on new stock and old, and any surplus remained, that it should be applied to pay arrears of interest on old stock. We can decide no such thing in this suit. The old stockholders deserved great credit, they began the improvement of the state, they persevered under difficulties and discouragements, where many would have despaired. The canal is eminently useful. I hope and believe it will from this time be profitable. I have confidence [*51] in the honesty and fairness of the whole company; but I can go no further. There is nothing before us but the one question, and that is decided for the defendants.

Judgment for defendants.

[PHILADELPHIA, JANUARY 12, 1835.]

Amos Taylor's Executors *against* Maris.

APPEAL.

The holder of a judgment, a lien on land, a portion of which is covered by a subsequent mortgage, does not by releasing a part of the land bound by the judgment, impair his right to be paid out of the remainder, including the portion embraced in the mortgage, unless the mortgagee has distinctly notified him of his mortgage before the release; and cautioned him against doing an act by which the mortgagee's security may be diminished: and the recording the mortgage is not such notice.

THIS was an appeal from the Court of Common Pleas of *Bucks* county, under the act of assembly, relative to the distribution of moneys arising from sheriffs' sales.

It appeared that Maris, the defendant, executed a mortgage dated the 9th November, 1832, and recorded the 11th of the same month, to Amos Taylor, to secure the payment of sixteen thousand dollars, with interest half-yearly. A bond with warrant of attorney accompanied the mortgage, on which judgment was entered on the 20th January, 1823, for the penal sum of thirty-two thousand dollars.

On the 21st day of January, 1823, Maris executed two mortgages to Rachel Maris, guardian, one conditioned for the payment of nine thousand dollars, and embracing a portion of the real estate, covered by the mortgage of Taylor; the other for the payment of twenty-one thousand dollars, not including any of the real estate mortgaged to Taylor. Both mortgages were recorded the 22d day of January, 1823, and were accompanied by bonds, but without any warrant of attorney to confess judgment.

On the 28th of April, 1823, Taylor released from the lien of his judgment, certain parts of the real estate of the defendant, by the following instrument:—

"Whereas, Amos Taylor, on the 20th day of January, in the present year of our Lord, 1823, did obtain a judgment by virtue of a warrant of attorney, entered upon the docket of the

Court of Common Pleas at Doylestown, in and for the county
[*52] of Bucks, in the state of Pennsylvania, *against William Maris, of Solebury township, in the said county of Bucks, gentleman, for the sum of thirty-two thousand dollars debt, besides costs of suit, as by the record of the said court appears, which said judgment is a lien upon all and singular, the lands and tenements of him the said William Maris, within the said county of Bucks, and the said Amos Taylor upon the suggestion, and at the instance and request of the said William Maris, is desirous of discharging the property hereinafter expressed, mentioned, and described, from all lien and obligation from the said judgment arising. Now, know all men, that at the request aforesaid, he, the said Amos Taylor, for himself, his heirs, executors, and administrators, doth covenant, promise, agree, and engage, that he or they shall not, and will not at any time or times hereafter, proceed against by legal process or otherwise, the following described property, to wit: A certain tract of land and mills, containing one hundred and forty-nine acres and thirty-eight perches, which David Heston and Phebe his wife, conveyed to the said William Maris, by deed dated the 1st day of April, 1819, situate, lying and being in Solebury township, in the county of Bucks aforesaid. Also, a certain messuage and tract of land, upon which the said William Maris now resides, situate in the said township of Solebury, in the county of Bucks, containing about twenty acres and eighty-seven perches. Also, a lot of land in the same township and county, lying between Lewis S. Coryell's lot, and the River road on the north side of Bridge street; containing about ninety-five square perches of land. And also, that one undivided moiety to which the said William Maris is entitled of, and in the Union Mills, and lands thereunto belonging; containing about fifteen acres, situate in the township and county aforesaid, together with the appurtenances. And that he, the said Amos Taylor, his heirs, executors, or administrators, shall not, and will not look to the said described premises, or any part thereof, for the payment of the judgment debt aforesaid, or any part thereof, or the interest accrued or to accrue thereon, or any way disturb, molest, or put to charge,

or damage the present, or any future owner or owners, or occupier or occupiers of the said described premises, or any part thereof; for or by reason of the said judgment, or any matter, cause, or thing thence arising or to arise; provided that nothing herein contained, shall affect the said judgment, or its legal validity; so far as respects all other, the lands and tenements of the said William Maris, situate in the county of Bucks, aforesaid; which are not herein expressly exonerated therefrom. In witness whereof, the said Amos Taylor, hath hereunto set his hand and seal, the 28th day of April, in the year of our Lord, 1823."

The property mortgaged to Taylor at the time of the execution of *the mortgage, was worth more than sufficient for its payment. No part of this property covered by Taylor's mortgage was included in the release. [*53]

Under a *pluries venditioni exponas* to February Term, 1833, on Taylor's judgment, property of the defendant was sold by the sheriff to the amount of twenty thousand six hundred and ninety-five dollars, of which sum eleven thousand four hundred and ninety-five dollars were raised from the sale of that part of the property which was covered by Mrs. Maris's mortgage for twenty-one thousand dollars.

The sum of eleven thousand four hundred and ninety-five dollars was claimed by Mrs. Maris out of the proceeds of the sale.

The following deposition of Merrick Reeder, Esq., was taken on behalf of Rachel R. Maris, in pursuance of a rule of court, and read on the argument of the case in the court below.

"Merrick Reeder, being duly affirmed, doth declare and say, that I am acquainted with the property described in a mortgage given by William Maris to Rachel R. Maris, for the use of Thomas R. Maris, Richard Maris, George G. Maris, and William Maris, Jr., for the payment of twenty-one thousand dollars, and dated the 21st day of January, 1823, having lived in the immediate neighborhood of it for more than thirty years, and surveyed the principal part of said property; and that lots No. 1, No. 2, No. 3, and No. 6, and No. 7, as described in the sheriff's advertisement of the sale of William

Maris's property under an execution issued by the executors of Amos Taylor, deceased, and which were sold on the 19th day of January, 1833, by virtue of said execution, for the sum of eleven thousand four hundred and ninety-five dollars, are parts of the same property described in the above-mentioned mortgage, all the above-mentioned lots being covered by the mortgage aforesaid, and worth at the date of the mortgage in my estimation about fifteen thousand dollars; and the residue of the property covered by the mortgage not sold by the sheriff was probably worth the balance of the mortgage in 1823. I am likewise acquainted with the property described in the mortgage given by William Maris to Amos Taylor, dated the 9th of November, 1822, for sixteen thousand dollars, which property was worth in my estimation at the time about fifteen thousand dollars. This property I have known for more than thirty years, and have surveyed it more than once within the time; there have been two stone houses built upon the premises in addition to the mansion house and manufacturing establishments, but as to the precise time they were built I am not able to say, but I am inclined to think they have been built since the date of the mortgage. I am well acquainted with a certain property belonging to William Maris, situate in Solebury township, containing about one hundred and [*54] *forty-nine acres, on which are a grist-mill and a large cotton manufactory. This property was purchased by William Maris of David Heston, and is generally distinguished by the name of the Heston property. This property was mortgaged by William Maris in December, 1822, to the New Hope Delaware Bridge Company, to secure payment of twenty thousand dollars. I considered this property to be worth at that time ten thousand dollars over and above the Bridge Company's mortgage aforesaid, or in other words, I considered the Heston property to be worth thirty thousand dollars. I am also acquainted with William Maris's mansion house property, containing about twenty acres, situate near New Hope, in the township aforesaid, (consisting of several lots of land.) This property in April, 1823, I think was worth seven thousand dollars, and was some years after transferred to the New

Hope Delaware Bridge Company, who about three years ago sold it to Richard Randolph, for about five thousand dollars, it may be more, it may be less. This sale to Randolph, I considered at the time it was made to be very low, the cheapest bargain that had been sold in the neighbourhood for many years. I am acquainted with a lot of about ninety-five square perches of land, owned by William Maris, in the village of New Hope, between a lot belonging to Lewis S. Coryell and the river road, and fronting on Bridge street. This lot was worth in April, 1823, about seventeen hundred dollars. I am likewise acquainted with a property called Union Mills, situated on the river Delaware, in the township aforesaid, containing about fifteen acres, owned by William Maris and Lewis S. Coryell. This property was purchased of Edward Blackfan before the mills were built, and in April, 1823, it was worth ten thousand dollars, say for William Maris's half, five thousand dollars. This property has since been conveyed to the New Hope Delaware Bridge Company, who have conveyed the same to Elias Ely, and others, who are the present possessors. Lewis S. Coryell's interest in the said property, was conveyed to the Bridge Company towards the payment of his debts, but as to William Maris's interest I cannot say to whom it was first conveyed, but finally it fell into the hands of the Bridge Company.

"The aforesaid properties, to wit, the Heston property, the mansion house property, the ninety-five perches in New Hope, and the Union Mill property, are all included in the release from Amos Taylor to William Maris, bearing date the 28th day of April, 1823, which release I have seen this day upon record in the recorder's office of Bucks county. The aggregate value of the property aforesaid in 1823, estimated by me over and above the twenty thousand dollar mortgage to the New Hope Delaware Bridge Company, is twenty-three thousand seven hundred dollars, and in my opinion the same property was worth as much or more in January, 1833, as it was in 1823 when the release was given."

Cross-examined by *A. Chapman*, Esq.

*"I am inclined to think that the property is worth more now than in 1823, in consequence of some im- [*55]

provements put upon it since that time by William Maris. On the Heston property an addition to the house has been built, which probably cost from two to three thousand dollars, and a frame tenement house of considerable worth. On the New Hope lot there was lately built a stone house, not yet finished, which has already cost about one thousand dollars.

"The Union Mills is probably enhanced in value, in consequence of the Delaware division of the Pennsylvania canal passing near it."

The court below decided that the plaintiffs were entitled to be paid the amount of the debt, and interest in the execution. From this decision, Mrs. Maris appealed, and it was now spoken to by—

Ross, for the appellant, who referred to the act of 2d April, 1822, giving the defendant in the *scire facias* where the mortgagor has released part of the mortgaged premises an additional plea, that the balance claimed is greater than in a just proportion ought to be levied out of the premises. It is a familiar principle of equity, that where land is charged with a burden, each part ought to bear no more than its just proportion of the charge. If part of the land charged be released, the remainder is chargable only with its ratable proportion of the original debt and interest, according to the relative value at the date of the charge. 1 Johns. C. R. 425; Stevens *v.* Cooper, 10 Johns. 414; 2 Penn. Rep. 283, M'Lanahan *v.* M'Lanahan; 2 Binn. 299, Guier *v.* Kelly; 1 Yeates, 189, Morris *v.* Griffith; 1 Johns. Ch. R. 412, Cheeseborough *v.* Millard; 9 Serg. & Rawle, 309; 1 Rawle, 302, 4; 7 Johns. Ch. Rep. 14, St. Andrews Church *v.* Tomkins; 2 Penn. Rep. 520.

The recording of Mrs. Maris's mortgage, was notice to Taylor. The recording a mortgage is constructive notice to all the world. Evans *v.* Jones, 1 Yeates, 172; Levinz *v.* Will, 1 Dall. 435. Taylor, before he released, was bound to go to the record and see whether any subsequent liens were entered.

Chauncey, contra.—The true principle is substitution. If the creditor having notice of the claim of the junior creditor,

parts with the fund out of which the latter might be paid, an equity arises in favour of the junior creditor. But this notice must be express, and not merely of the existence of the mortgage, but that there is an equity claimed under it. This head of equity arose from marshalling assets in chancery. No case has been produced yet, to show that if the first creditor exonerates the fund which the junior creditor has not, he loses his rights on the rest. Certainly, there can be no such principle without notice. May not the primary creditor deal with it according to his own interest and humanity? He cited the following cases. Sagitary *v.* Hyde, 1 Vern. 455; 10 Mod 488; *Ambler, 615; 8 Ves. 388; 4 Johns. Ch. 123; 1 Hopk. 469; 19 Johns. 486; 9 Serg. & Rawle, 309. [*56]

Sergeant, on the same side, was stopped by the court:

Kittera in reply.

The opinion of the court was delivered by

SERGEANT, J.—The right of the holder of a judgment binding real estate, to discharge by covenant or release, a portion of that estate from the lien, preserving it in force against the rest, cannot, as between the creditor and debtor, be disputed. It is no more than an act of common justice, where the remaining property is sufficient to respond to the claim: and he would be thought a harsh creditor, who, under such circumstances, should refuse it, when, by enabling the debtor to make a clear title to a purchaser, it might materially relieve him. It is in truth no more than perfecting a partial equity already existing, by which, if the debtor sells a portion of land bound by a judgment, the remaining land in the hands of the debtor or his heir or vendee, must first be proceeded against by the judgment creditor, before the land of the prior purchaser can be levied on. Sir Wm. Harbert's Case, 3 Co. 11; Naylor *v.* Stanley, 10 Serg. & Rawle, 450; Culp *v.* Fisher, 1 Watts, 494.

An act, however, which is perfectly innocent and legal in itself, may become improper, if the party has notice that the rights of third persons may be impaired by it. As if such covenantor or releasor is apprised beforehand that a portion of the land is bound by a subsequent mortgage in favour of

another person, and that if he discharges a different portion, and reserves his lien against the part bound by such mortgage, thus loading it with a double burden, the claim of the mortgagee will be sacrificed by his priority. It is manifest that it is unfair and inequitable that he should voluntarily do an act producing these consequences. *Sic utere tuo ut alienum non lædas.* Thus in an analogous case: A person may buy a legal title free from all secret trusts: but if he has notice of a trust, though he may have paid his money, equity will make him the trustee for the party beneficially interested.

But it is essential that notice be shown. It is not sufficient to say, that by the release there is a possibility that injury may result to some one. Perhaps there is no exercise of a legal right, from which, by possibility, a loss may not result to others in particular cases. Whoever buys a legal title, may by possibility do injury by destroying trusts and equities of which he is not apprised. In itself the act is innocent. It becomes otherwise when the party knows that it will occasion a loss to a third person.

Had the defendant, Mrs. Maris, given Mr. Taylor notice of her mortgage and desired him to retain his lien, or at least so much of *it as would cover his claim, leaving the premises mortgaged for her use, it would have been his duty to refrain. But she never did; nor is there the least pretence that he knew of it. It is insisted that the recording of the mortgage was constructive notice to him; but that cannot be. A mortgage or judgment is a lien: the recording a mortgage, or docketing a judgment, is notice of that lien to a subsequent purchaser or incumbrancer, and he is bound to search for it. But what has the holder of a prior lien to do with hunting up subsequent liens? The task would be endless; and nowhere more so than here, where liens are various in their nature, multiplied in their number, and scattered in their registry. What with mortgages, judgments, awards, testatums, transcripts, recognizances, legacies charged on land, mechanics' claims, registered taxes, debts of intestates, &c., &c., there is no end to them; and if a man could not do a legal act, till he hunted up these varieties of liens, traced them

[*57]

through all their bearings, and examined how far he would displace or shake them in the hands of strangers, of whose concerns he is ignorant, the right to act at all would be taken away; and a judgment entered up on a bond and warrant, or otherwise obtained, and binding lands to ten times the debt, must remain unalterable, pressing the debtor down, and tying up all his property from alienation. It is well settled in equity, that a judgment is not constructive notice. Sudgen, in his treatise on Vendors says, the docketing of judgments is not of itself notice to a purchaser: for, says Lord Chancellor Talbot, judgments are infinite. Sudg. Vend. 539; 2 Ch. Cas. 47; Amb. 154; 1 Ch. Cas. 37; 2 Freem. 176; 2 Eq. Cas. Ab. 682. And I see no difference in this respect between judgments and other liens. It was the duty of the defendant if she meant to gain an equity, to notify the plaintiff distinctly of her position, and to caution him not to do an act by which her security would be diminished.

The act of 2d April, 1822, in relation to the releasing of parts of mortgaged premises, has been alluded to in the argument. This act enables a mortgagee in such case, to sue out a *scire facias* to recover his claim against the remaining property, but makes no provision as to the effect of the release, leaving that to be decided by established principles of law and equity. And according to these, I take it, the effect of such release must depend on the circumstances of the case. If the mortgagee has notice that by such act, he sacrifices the interest of a subsequent lien creditor, he will be bound to withhold his hand, or if he proceeds, will be held responsible for the loss incurred. He may have this knowledge in the very creation of the mortgage. As if two or more severally seized of land, join in a mortgage, they are all *in æquali jure*, entitled to contribution amongst themselves; and if the mortgagee should release the land of one from the mortgage, leaving the whole sum to be levied of the remaining lands, he would be doing an act of the injustice of which he was fully *conusant. [*58]
So where the mortgage was originally by one, and a purchaser of part from the mortgagor intervenes, and before releasing, that fact is known to the mortgagee. See Sir Wm.

Harbert's Case. And this is the principle of the case of Stevens *v.* Cooper, 1 Johns. Ch. 430; where the mortgagee of six lots, released four, after he knew that a third person had become the purchaser of one of the other two; it was held ratably to reduce the power of the mortgagee over the remaining lots, because it deprived the owners of those lots of their right of contribution as against the lots so released. But in Cheesebrough *v.* Millard, in the same book, p. 414, the decision was the other way, because the mortgagee who made an arrangement by which a portion of his security was relinquished, and a subsequent judgment creditor was cut out, had no notice. The language of Chancellor Kent is apposite to the present case. "If the judgment creditor had given notice to the owner of the first mortgage, before the arrangement and discharge took place, of the equity which he claimed and expected, I might probably have been inclined to have stayed to a certain extent the operation of the second mortgage. But there is no evidence nor even ground for presumption, that either Marvin or Millard, the owners of the mortgages, knew of the existence of the judgment, when the arrangement was made and carried into effect. They were not bound to search for the judgment, and the record was no constructive notice to them: and as the rule of substitution rests on the basis of mere equity and benevolence, the creditor who has thus disabled himself from making it is not to be injured thereby, provided he acted without knowledge of the other's rights, and with good faith and good intention, which is all that equity in such case requires." (Pothier's Traité des Oblig. No. 520.) "The other debtors and sureties," to adopt the observations of Pothier, "might as well as the creditor, have taken care of the right of hypothecation which he has lost: they might summon him to interrupt at their risk the third purchasers, or to oppose the decrees. It is only in the case in which they may have put the creditor in default, that they may complain that he has lost his hypothecation."

The principles of English Chancery are the same. I shall content myself with citing a single case decided in that court, in which the doctrine was established: Griswold *v.* Marsh-

[Taylor's Executors *v.* Maris.]

man, 2 Ch. Cases, 170. There was due to Marshman four thousand pounds upon a mortgage made to him of lands. The mortgagor after the mortgage acknowledged three judgments to other persons for other moneys due. Two of those persons to whom the judgments were given, gave notice to Mr. Marshman of their judgments, and desired him to accept of his money that was due upon the mortgage, which they said they were ready to pay him, and desired him to appoint a time when, and they would pay him his money within a fortnight, to the intent that his mortgage being set aside they might take execution on their judgments, but proved not any money actually tendered. *But afterwards Marshman exhibited a bill against the mortgagor and had a decree [*59] to foreclose him of redemption: and afterwards took a further absolute conveyance from the mortgagor for a considerable sum of money. And now the two creditors had a decree against Marshman to pay them their money, but Powell, the third creditor, had no relief, because he gave no notice in time, of his judgment. Decree affirmed.

Cited by Counsel, 7 W. & S. 74; 9 W. & S. 40; 1 Barr, 362; 2 Barr, 96; 4 Barr, 88; 9 Barr, 402; 1 J. 314; 1 Wr. 272, 453; 10 N. 294, s. c. 8 W. N. C. 21; 1 O. 87.

Cited by the Court, 1 Barr, 280.

This case has of late years been frequently commended and followed: 9 N. 391, and other cases cited below. It was said in 12 N. 35, that this doctrine is one of equity jurisprudence, and not of positive law; and hence, to affect the conscience of the mortgagee, he should have actual and not merely constructive notice of the equity claimed by the junior incumbrancer. To hold otherwise would compel the senior incumbrancer to do for the junior what in equity and good conscience he ought to do for himself. And it was accordingly held that possession and building did not give notice that mechanics' liens had accrued on part of the property: 12 N. 35, s. c. 8 W. N. C. 262. Indeed, it seems that nothing but actual notice and warning given by the second incumbrancer will protect him: 10 W. N. C. 135, 136; 11 W. N. C. 523; 2 O. 421; 4 O. 457, s. c. 12 W. N. C. 395. The rule of these cases must not be confounded with that of a parallel line, which holds that a release of one part of a tract bound by a lien will operate to discharge other parts, which, in the course of an equitable marshalling of the assets, would be liable only after the part released had been exhausted. This rule is nothing more than an extension of the one providing that a release of a principal operates to release the surety, and instances of it may be found in 9 W. N. C. 486, 487; 2 Gr. 402.

[PHILADELPHIA, JANUARY 12, 1835.]

Bailey *against* The Commonwealth.

IN ERROR.

An averment in an indictment against a justice for refusing a copy of his proceedings, of a tender of eighteen and three-quarter cents for a copy of his proceedings at large is sufficient.

THIS was a writ of error to the Quarter Sessions of *Bucks* county. It was a prosecution against William Bailey, a justice of the peace, for refusing a copy of his proceedings in a suit before him.

The indictment was in the following terms:

"The grand inquest, &c., do present, that William Bailey, late of the county aforesaid, yeoman, being a justice of the peace in and for the district numbered six, composed of the townships of Buckingham and Solebury, in the said county of Bucks, duly commissioned and sworn to do the duties of the said office with fidelity and according to law, a certain suit was commenced and instituted before him, as such, of which suit, and of the cause of action thereof, he lawfully had jurisdiction and cognizance, wherein a certain John Bye was plaintiff, and a certain Francis Campbell was defendant, and in which suit the said William Bailey, as a justice of the peace, entered judgment: and that on the 14th day of July, in the year of our Lord, 1836, at the county aforesaid, and within the jurisdiction of this court, with force and arms, &c., he the said William Bailey, as a justice of the peace, did unlawfully refuse to make out a copy of his proceedings at large in the said suit and deliver the said copy duly certified by him to the said Francis Campbell, the defendant in the suit; he the said Francis Campbell, having then and there required and demanded the same *of the said William Bailey as a justice; and he the said Francis Campbell then and there did tender unto him the said William Bailey, as a justice of the peace, eighteen and three-quarter cents, the just and

[*60]

legal fee of him, the said William, for his services in that behalf aforesaid: to the great hindrance and obstruction of public justice, contrary to the form of the act of assembly in such case made and provided, and against the peace and dignity of the commonwealth of Pennsylvania."

The defendant brought this writ of error, and assigned for error—

1. That there is no sufficient averment in the indictment that the defendant below was tendered the fee he was by law entitled to receive, before the copy was demanded.

2. That the indictment charges that Francis Campbell required and demanded a copy of the proceedings at large duly certified by him, wherein judgment had been rendered, and tendered eighteen and three-quarter cents as the legal fees, which would have been the fee for a copy of the judgment only, and not for a copy of the proceedings at large with the judgment.

3. That the offence is not laid to the damage of any person.

4. That the sum alleged to have been tendered is eighteen and three-quarter cents which is uncertain. The fee tendered should have been eighteen cents and three-quarters of a cent for the copy of the judgment.

5. That the indictment does not aver that the defendant was a justice of the peace at the time of the demand made.

6. That the offence is not laid to be contrary to the duty of the defendant as a justice of the peace.

Porter for plaintiff in error, confined himself to the insufficiency of the tender and the allegation of it in the indictment, and cited 6 Serg. & Rawle, 88; Wilson *v.* The Commonwealth, 10 Serg. & Rawle, 373; Purd. Dig. 497, ed. of 1832.

Per Curiam.—This indictment seems to have been drawn with an eye to the case of Wilson *v.* The Commonwealth, the circumstances of which are nearly the same; where it was held that the fee of twenty-five cents allowed specifically by the fee bill then in force, for a copy of the judgment, was all that the party was bound to tender for a copy of the proceedings at

large. This fee of twenty-five cents is reduced by the present fee bill to eighteen cents and three-quarters of a cent; but the phraseology as to this and almost all other items remains the same. The decision then is in point, and being on the only exception argued here, disposes of the case.

Judgment affirmed.

[*61] *[PHILADELPHIA, JANUARY 12, 1835.]

White *against* White.

APPEAL.

Affidavit of jurors are inadmissible to inculpate their fellows or themselves.

It is no objection to an inquisition valuing real estate, that the jurors made separate estimates of value which were added together and the medium value extracted, and returned as their valuation of the property; this course having been resorted to, not as decisive of the question, but as an approximation to unanimity.

Nor is the validity of the inquisition affected by the presence of the sheriff with the inquest, where there did not appear to have been any improper interference with their duties on his part.

APPEAL from the decree of the Orphans' Court of *Bucks* county, confirming the valuation and appraisement of the real estate of George White deceased.

In pursuance of a petition presented to the Orphans' Court of Bucks county, at December Term, 1832, by Mary White, the widow, and David and Rebecca White, the children of George White deceased, the court appointed seven men, named in the petition, to part and value the real estate of the decedent. The persons thus appointed made report of their proceedings to February Term, 1833, in which they valued the estate, consisting of a messuage and tract of land containing one hundred and twenty-eight acres sixty perches at seventeen dollars and fifty cents per acre.

Exceptions were filed to this report by Rebecca White the daughter, and on the 13th of March, 1833, the court set it aside.

A second petition was then presented by David White the son, praying the court to award an inquest to be held by the sheriff on the same real estate, which was granted. In pursuance of this order the sheriff held an inquest, and to April Term, 1833, returned an inquisition from which it appeared that the jury had valued the estate at twenty-two dollars and fifty cents an acre. To this inquisition the following exceptions were taken by David White.

1. That one of the jury was so much intoxicated as to be disabled from acting with a proper degree of intelligence and reason.

2. That when the jury retired to deliberate and decide upon the matters laid before them, the sheriff was present, and took part with the jury in the discussion and decision of the finding and valuation and division of the estate of the said George White deceased.

3. That certain individuals, not interested in the estate were present and endeavoured to influence the jury in their decision, especially the juror who was so much intoxicated, as before mentioned.

4. That the decision of the jury was made by balloting.

5. That the sheriff declared to a person before the meeting of *the jury that this time it should be valued so high that none of the parties would be able to take it. [*62]

Among the depositions returned with the record were those of two of the inquest, one of whom among other things, stated in substance, that one of the jurors was so much intoxicated as to be disqualified for performing his duties properly, while his colleague entirely differed from him, ascribing to sickness, produced by having swallowed a piece of tobacco, what the other attributed to intoxication.

The deposition of B. Morris, Esq., the sheriff, was also returned, who stated that he was in the room with the jury at the time they agreed upon the valuation: That after dinner they all went into a room and he began to write the inquisition: That after they had agreed on the mode of voting, he gave to each of them a piece of blank paper: That some one asked him for a pencil, and the jury said their object in voting

was to know each other's mind without talking about it; that they did not consider the vote binding: That he told the jury they ought to put in what the property was really worth: That he then went on writing the inquisition, and having but one pencil the jury took some time in putting down their votes: That some one collected the papers and the jury asked him to set them down, which he did, but was not able to state the result: That he went on writing the inquisition, and finally they all agreed that twenty-six dollars and twenty-five cents should be the sum: That the highest sum voted for was thirty dollars, and the lowest twenty dollars: That some one having said that the lowest vote was that of A. Stover, he denied it; showed that his vote was for twenty-five dollars, and said that this was his candid honest opinion: That eight of the votes were for twenty-five dollars, two or three for thirty dollars, and one for twenty-seven dollars and fifty cents, or thereabouts: That when he had finished the inquisition he asked the jury if they had agreed; they said they had, and he then called over their names and they all agreed on twenty-six dollars and twenty-five cents, and signed the inquisition: That when he met the jury they all appeared sober except one; there was brandy and gin on the table, and they might drink or let it alone: That after they had all started out to view the premises, he thought one of them (whom he named) had taken too much liquor: That when he handed him the paper he thought he had taken too much liquor, and that his judgment might be wild on the subject: That when that juror was called to sign the inquisition he was sitting as if he was asleep, but he got up, went to the table and signed his name: That he (the sheriff) did not say anything to any person about the value of the property being too high: That he had never, since he had been sheriff, been absent from a jury in taking an inquisition, and that he had never held an inquest in any part of Bucks county, the members of which did not compare their sentiments in the first place by balloting.

On his cross-examination the deponent stated that he did [*63] not go *out of the room to bring in the juror who was alleged to have been intoxicated, nor did he know that

he was out: That his impression from the manner of the juror was that he was drunk, and he was afraid he would not know what he was about, yet when he came to sign his name, he was surprised to see it done so well: That he did not know whether the juror put down his number, but there were twelve papers: That he put down the different sums and added them up, and divided the sum total by twelve at the request of the jury, who, he believed understood what they were doing, except the one above spoken of, and he did not know that he did not: That there was no person in the room but himself and the jury: That after they had voted they talked on the subject and agreed on twenty-six dollars and twenty-five cents, and that the mode adopted was suggested by the jury or some one of them.

The Orphans' Court confirmed the inquisition, and David White appealed from their decree.

Ross, for the appellant, cited Case of Bryson's Road, 2 Penn. R. 207; Rex *v.* Rex, 3 Serg. & Rawle, 533; Zuber *v.* Geigar, 2 Yeates, 522; 3 Caines, 57; 15 John. 87.

Porter, *contra*, referred to Cowperthwaite *v.* Jones, 2 Dall. 55.

The opinion of the court was delivered by

Gibson, C. J.—It is settled by Cluggage *v.* Swan, 4 Binney, 150, and an unbroken current of modern decisions, that affidavits of jurors are inadmissible to inculpate their fellows or themselves. The matter here, then, stands on the testimony of the sheriff alone; and the charge of intoxication is not so clearly proved by it as to call for a new inquest. He speaks of an impression from the looks of one of the jurors that he was drunk, which seems to have been effaced by the promptness and self-possession evinced by him when called on to act. Its accuracy is certainly not strengthened by the circumstances; and nothing is more deceptive than appearances. A case therefore is not made out, to overturn the inquisition on that ground; and the other principal exception—that the decision was made by ballot, is not better founded. It satisfactorily appears that recourse was had to a medium value extracted from the sepa-

rate estimates of all the jurors, not as decisive of the question but as an approximation to unanimity. There was no agreement to stand to the result; and the sum produced was adopted as the ratio but on further reflection and consultation. Every assessment of value necessarily involves a compromise of opinion, and a juror may therefore yield his judgment to that of the majority without compromising his principles, because the attainment of the unanimity which the law requires, would seldom be had without it. A measure therefore to sound the general tone, without giving a pledge to conform to it, is always lawful and often expedient. As to the presence [*64] of the sheriff at the *consultation of the inquest it is sufficient to say that it is in conformity to the practice in every part of the state; and that it does not seem to have been attended with an improper interference of the officer in the present instance. The remaining exceptions are destitute of the colour of proof.

Appeal dismissed and decree affirmed.

Cited by Counsel, 6 H. 376.

[Philadelphia, January 12, 1835.]

Hellings *against* The Commonwealth.

IN ERROR

An indictment does not lie against a collector of taxes for embezzlement of moneys received by him for taxes; the act of 1799 having pointed out a specific remedy.

Error to the Quarter Sessions of *Bucks* county.

It was an indictment against Hellings, a collector of taxes, for embezzling moneys received by him.

The indictment contained four counts.

The first count charged, "That John A. Hellings late of the county aforesaid, yeoman, on the 10th day of June, in the year of our Lord 1833, and long before and since was a collector of the county taxes for the township of Bensalem, in the county

[Hellings *v.* the Commonwealth.]

of Bucks; and during the time when he was such collector as aforesaid, did receive and have to and for the use of the inhabitants of the said county of Bucks, the sum of one thousand dollars for the amount of taxes in the said township of Bensalem during the years 1832 and 1833; and for which said last mentioned sum of one thousand dollars, he the said John A. Hellings, according to the duty of the said collector of the county taxes in the said township of Bensalem, ought well and faithfully to have accounted; nevertheless the said John A. Hellings, well knowing the premises last mentioned, but wickedly devising and intending to cheat and defraud the said inhabitants of the county of Bucks of the said sum of one thousand dollars, afterwards, to wit: on the 1st of December in the year of our Lord 1833 at the county aforesaid, and within the jurisdiction of this court, unlawfully, willfully, contemptuously, fraudulently, and deceitfully, did neglect and refuse to account with *the said inhabitants of the county of Bucks, or with the commissioners or treasurer of the said county [*65] of Bucks, for the said last mentioned sum of one thousand dollars; by reason whereof, he the said John A. Hellings did then and there, to wit, on the day and year last above mentioned at the county aforesaid, and within the jurisdiction of this court, unlawfully acquire and get to himself the said last mentioned sum of one thousand dollars of the proper money of the said inhabitants of the county of Bucks, with intent then and there to cheat and defraud the said inhabitants of the said county of Bucks of the same; and did then and there, by the means last aforesaid, unlawfully, willfully, fraudulently, and deceitfully cheat and defraud the said inhabitants of the said county of Bucks of the said last mentioned sum of one thousand dollars, to the great damage and impoverishment of the said inhabitants of the county of Bucks, to the manifest perversion of justice, in contempt of the laws of the commonwealth of Pennsylvania, to the evil example of all others in like cases offending, and against the peace and dignity of the commonwealth of Pennsylvania."

The second count, after averring that the defendant was a collector of county taxes as in the first count, and had the col-

lection, custody, and charge of divers sums of money, of and belonging to the inhabitants of the county of Bucks, and had the charge and keeping of accounts of certain sums of money received by him as taxes for and on account of, and to the use of the said inhabitants, charged that he "unlawfully, fraudulently, deceitfully, and injuriously did pretend and affirm that the said sum of one thousand dollars so by him collected as aforesaid, had been stolen and carried away by some person or persons unknown out of his dwelling-house, during his absence from his said dwelling-house. Whereas, in truth and in fact, the said sum of one thousand dollars, so by him collected as aforesaid, had never been stolen and carried away by any person, or persons unknown, out of his dwelling-house during his absence from his said dwelling, and so the jurors aforesaid, on their oaths and affirmations aforesaid, do say, that the said John A. Hellings, on the same day and year last mentioned at the county aforesaid, and within the jurisdiction of this court, unlawfully, unjustly, fraudulently, and deceitfully, did deceive and defraud the inhabitants of the said county of Bucks of the said sum of one thousand dollars in manner and by the means aforesaid. To the great damage and impoverishment of the inhabitants of the county of Bucks, to the manifest perversion of justice, in contempt of the laws of the commonwealth of Pennsylvania, to the evil example of all others in like case offending, and against the peace and dignity of the commonwealth of Pennsylvania."

The third count was similar to the second, except that it charged the defendant with having received one hundred dollars with a similar false affirmation and pretence.

[*66] *The fourth count, after averring the defendant's appointment as a collector of state and county taxes, and that a certain Anthony Taylor had become his security to the commissioners of Bucks for the amount of the state and county tax assessed in Bensalem township for the years 1832 and 1833; and that the defendant had collected and received divers sums of money amounting to the sum of two thousand dollars from the taxable inhabitants of said township, charged, that the defendant on the first day of December in the year of

our Lord 1834, at the county aforesaid and within the jurisdiction of this court; not regarding his duty in that behalf, but unlawfully and unjustly contriving and intending to cheat and defraud the said Anthony Taylor, who was security as aforesaid for the payment of the said sum of money so by him the said John A. Hellings collected as aforesaid, then and there did falsely pretend that the said sum of money, so as aforesaid by him collected, had been stolen and carried away by some person or persons unknown, out of his dwelling-house during his absence from said dwelling-house. Whereas, in truth and in fact, the said sum of money so as aforesaid collected by him, the said John A. Hellings, had never been stolen and carried away by any person or persons unknown out of his dwelling-house during his absence from said dwelling-house, with intention to cheat and defraud the said Anthony Taylor of the said sum of money, to the manifest perversion of justice, to the great damage of the said Anthony Taylor, to the evil example of all others in like case offending, and against the peace and dignity of the commonwealth of Pennsylvania."

To this indictment the defendant pleaded not guilty. The cause came on for trial at September sessions, 1834; a verdict of guilty was rendered by the jury, whereupon the following reasons were filed in arrest of judgment.

1st. The matter charged in the bill does not constitute an indictable offence at common law.

2d. It is not alleged in the indictment that the fraud was effected by means of any false tokens, having the semblance of public authority or touching the public interest; and neither is it averred, that it was effected by means of conspiracy or forgery.

3d. The only means by which the indictment alleges the fraud or cheat to have been effected is a simple false affirmation, which is not sufficient to constitute the deceitful practice or false token required by the common law.

4th. The defendant (even if the facts set forth be true) can be guilty of a mere breach of trust and not of any criminal offence whatever.

5th. In all cases of cheat or frauds at common law, it is

necessary that the false tokens or illegal practice should create the credit.

[*67] *6th. There is no averment in the second count, that the inhabitants of the county of Bucks were defrauded in consequence, or by means of any false pretence or token.

7th. The third and fourth counts merely aver that the false pretence was used with intent to defraud, &c. They contain no averment that he did defraud, &c.

8th. There is no averment, that the defendant obtained possession of the money in consequence of the false pretences, or that he at any time appropriated it to his own use.

The court overruled the reasons in arrest of judgment, and sentenced the defendant to pay a fine of two thousand dollars to the commonwealth, and to eighteen months' imprisonment.

The defendant thereupon brought this writ of error, and assigned for error:

That the court erred in overruling the reasons in arrest of judgment.

Ross, for the plaintiff in error, soon after he had commenced his argument was stopped by the court.

Rush, for the Commonwealth, being called on to support the judgment, contended:—

1. That the offence laid in the indictment was a cheat and fraud, affecting the public, and as such indictable. Cheats by statutes, Hen. 8, Eliz. and Geo. 3, are frauds effected by false tokens. Cheats at the common law consist in the fraudulent obtaining the property of another, by any deceitful and illegal practice or token (short of felony) which affects the public. East, Cr. L. 818. Frauds affecting the course of justice and immediately injuring the interests of the public, are indictable at common law. 3 Chitty, Cr. L. 995. Although they arise from the particular transactions of individuals. 2 Russel on Crimes, 1362; 2 Serg. & Rawle, 552, per Tilghman, C. J.; 2 East, C. L. 816; Rex *v.* Wheatley, 2 Burr. 1125.

2. Public officers may be indicted for frauds committed in their official capacities. 1 Russel on Crimes, 219.

[Hellings *v.* The Commonwealth.]

Hellings was a public officer. His offence was an injury to the public, whether false tokens were used or not. Resp. *v.* Powel, 1 Dall. 47. Public officers convicted for embezzling public funds. Commonwealth *v.* Wade, 1 Dall. 335, in notes, (Wharton's ed.) The embezzlement of public money has likewise in this state been deemed a public wrong, for which the private sufferer was not alone entitled to redress. Resp. *v.* Teischer, 1 Dall. 335. An indictment averring "with intent to defraud the liege subjects," is sufficient. Resp. *v.* Sweers, 1 Dall. 44. The fraudulently neglecting and refusing to account is indictable. King *v.* Cummings, 5 Mod. 179. This case is an answer to the objection that the act of assembly provides a penalty for neglecting and refusing to pay the moneys received. The same objection was made in King *v.* Cummings, but overruled.

*3. He contended that the offence, if neither technically a cheat, fraud, nor deceit, was a misdemeanor at [*68] common law, and as such indictable. It is clearly a public wrong, and whatever amounts to a public wrong may be made the subject of an indictment. 1 Dall. 238; 7 Smith's Laws, 713.

The court declined hearing *Kittera* in reply.

Per Curiam.—The offence here is laid as embezzlement at the common law. Sir William Blackstone, speaking of misprisions in public trusts and employments, remarks in the fourth volume of his Commentaries, p. 121: "Hitherto also may be referred the offence of embezzling the public money, called by the Romans *peculatus*, which the Julian law punished with death in a magistrate, and with deportation or banishment in a private person. With us it is not a capital crime, but subjects the committer of it to discretionary fine and imprisonment." He refers to no authority for the last position; but we find in Moulsworth's Case, Comb. 187, where an overseer had charged the parish three pounds for putting out an apprentice who was in fact not put out, the expression of an opinion that there might be remedy by indictment; and in Mr. Chitty's Criminal Law, vol. 3, p. 701, we have two precedents

of an indictment for embezzlement at Common Law.* Yet it is not a little remarkable that no trace of such an offence is found in Hale or Hawkins, or the more recent English text books. The reason of it may be that the common law prohibition has been superseded in practice by the specific provisions of various statutes to punish the pilfering and stealing, not only of servants and clerks, but officers of the post-office and bank. The civil remedy must in a vast majority of instances be inadequate to the mischief; but the question here is whether it is not to be resorted to exclusively, by reason of our statutory provision to restrain the courts to specific remedies provided by the legislature. By the eighteenth and nineteenth sections of the act of 1799, the persons and estates of delinquent collectors, are liable to seizure and execution on summary process from the treasurer and commissioners; and the specific remedy thus provided has consequently supplanted the remedy at the common law.

Judgment reversed.

Cited by Counsel, 6 W. 385; 5 Barr, 63; 7 Barr, 275; 10 C. 88; 9 W. N. C. 130.

[*69] *[PHILADELPHIA, JANUARY 12, 1835.]

Hannah Downing, who survived Sarah Downing, Plaintiff in Error, *against* Daniel Funk, Defendant in Error.

IN ERROR.

Evidence of a promise to pay in consideration that the plaintiff would wait, forbear, or give time, indefinitely or for a reasonable time at the instance and request of the defendant, will maintain an action against the promiser.

A stipulation to pay on terms no more definite than waiting or forbearing for a time or giving time, or a longer time, will not entitle the plaintiff to recover.

THE defendant in error who was plaintiff below, brought this action to recover on an alleged parol promise made by the plaintiff in error to pay the debt of her brother.

---

* See Rex v. Martin, 2 Campb. 268.

[Downing *v.* Funk.]

The declaration contained two counts.

The first count stated in substance, that whereas one Israel Downing at the time of the making of the promise and undertaking of the said Hannah and Sarah hereinafter mentioned, was indebted to the said Daniel Funk in the sum of one hundred and thirty-one dollars and eighty-seven cents, and thereupon afterwards, &c., "in consideration of the premises, and that the said Daniel Funk at the special instance and request of the said Hannah and Sarah, would forbear and give time to the said Israel for the payment of the said sum of one hundred and thirty-one dollars and eighty-seven cents, they the said Hannah and Sarah undertook, and then and there faithfully promised the said Daniel to pay him the said sum of one hundred and thirty-one dollars and eighty-seven cents, when they the said Hannah and Sarah should be thereunto afterwards requested."

Averment, that the said Daniel confiding in the said promise and undertaking did forbear and give time to the said Israel for the payment of the sum of one hundred and thirty-one dollars and eighty-seven cents for a reasonable time, to wit, from the 30th day of September in the year last aforesaid, till the 30th day of March, 1830, and hitherto hath altogether forborne and given time, &c.

Second count: Whereas also afterwards, &c., one Israel Downing being then and there indebted to the said Daniel Funk in the sum of one hundred and thirty-one dollars and eighty-seven cents in consideration of the premises, and that the said Daniel Funk at the special instance and request of the said Hannah and Sarah, would forbear and give time, to the said Israel, for the payment of the said *sum of one hundred and thirty-one dollars and eighty-seven cents, [*70] they the said Hannah and Sarah undertook and promised to pay the said Daniel when they should be thereunto requested.

Averment, that the said Daniel confiding in the said promise and undertaking, did forbear, and give time, and hath hitherto altogether forborne and given time to the said Israel for the payment of the said sum, &c.

The plaintiff relied on the testimony contained in two depo-

sitions; one of Joel Funk his brother, and the other of Jesse Cook his agent, to sustain his cause of action.

Joel Funk of the county of Champaign, Ohio, being examined on behalf of the plaintiff deposed, that in September, 1828, in conversation with Hannah Downing and Sarah Downing, they said that if Daniel Funk (plaintiff), would give time, they would see an account paid that deponent then presented to them: and in answer to the third interrogatory, he said, that in September, 1828, he called at the dwelling of Hannah Downing and Sarah Downing with a bill against Israel Downing, in favour of the plaintiff. The amount of said bill was about one hundred and thirty dollars. After making known his business, Hannah Downing withdrew for a short time, and when she returned, said Israel Downing was sick and could not be seen; and also said, he, Israel, appeared sorry he could not then discharge the bill. Then Sarah Downing said she had assumed the payment of a bill from David Cook against Israel Downing, and would also pay this if longer time would be given. Deponent requested her to give her obligation for the amount of the bill presented, which she refused to do. Hannah Downing said that Sarah Downing's word could be relied on, and that she, Hannah Downing, would vouch for the payment if time was given.

The conversation referred to took place on the first floor of the dwelling of Hannah and Sarah Downing. Deponent did not know where Israel Downing was, but was told that he was sick and in bed.

In answer to the first cross-interrogatory, he said he had seen Hannah Downing one of the defendants twice. The first time in September, 1828. The second time in the summer of 1829.

In answer to the third cross-interrogatory, he said he called upon defendants with a bill, as stated in answer to third interrogatory, in favour of plaintiff; saw both of the defendants at that time; saw them together, except when Hannah Downing withdrew, as stated in answer to the third interrogatory. They were in the same apartment and on the first floor of the house.

In answer to the fourth interrogatory, he said he had a conversation *with the defendants relative to the bill in the third interrogatory, and would refer to the answer [*71] to that interrogatory for the substance of the conversation as near as could be recollected. Isaac Downing was present part of the time, and he thought heard some part of the conversation.

Deposition of Jesse Cook, taken in Adams county, Pennsylvania, states, "that he knows the parties in the foregoing action—that Daniel Funk informed this affirmant of a claim that he the said Daniel held against Israel Downing, and requested this affirmant to call on Mr. Downing for the amount of the demand. He called sometime in the summer of 1829, and not seeing Mr. Downing, and on informing Hannah and Israel Downing's mother of the claim that the said Funk held against Israel Downing, they the said Hannah and Sarah said, provided the said Daniel Funk would wait he should be paid, as they would pay him; that they believed Mr. Funk's claim against Israel Downing to be just."

Evidence was given on the part of the defendant to discredit the testimony of the plaintiff's two witnesses, and some rebutting testimony was also produced on the part of the plaintiff. None of this evidence however is material to the point now in controversy.

The defendant's counsel requested the court to instruct the jury on the following points.

1. Definiteness and certainty, as opposed to the vague and general, are necessary in the terms of every consideration.

2. A stipulation to forbear to sue for a time, for some time, or for a longer time, is insufficient, as a consideration of a contract to pay the debt of another.

3. If therefore there is no evidence in this case of a stipulation on the part of Hannah to pay the debt in question, upon more certain and definite terms, than waiting or forbearing for a time, or giving time, or some time, or a longer time, the plaintiff is not entitled to recover.

4. Neither the testimony of Jesse Cook nor of Joel Funk supplies the definiteness and certainty necessary in such cases.

5. The plaintiff having declared upon a joint contract cannot recover by proof of a several one, and there is no evidence to support the allegation of a joint contract, except that of Jesse Cook. If the jury therefore doubt the correctness of his testimony, the plaintiff is not entitled to recover.

6. The averments in the declaration are not supported by any evidence in the case.

The court charged as follows:

Having stated to the jury, that the consideration for the promise of the defendants as stated in the declaration was, that Israel Downing being indebted to Funk, in consideration that [*72] he, at *the instance of Sarah and Hannah Downing, would forbear and give time to Israel, they would pay; and that he did forbear and give time as stated in the declaration was a good consideration, well laid, and if proved the plaintiff was entitled to recover: that it need not be proved in the terms or words laid, but it was sufficient if substantially proved; that if, at the instance of the defendants, he would wait, forbear, and give time to Israel, thereby absolutely suspending his right to sue Israel for a time certain, or for a reasonable time, or indefinitely, and thus subjecting to loss, delay, or disadvantage, in consideration of which the defendant promised to pay the debt, and that he did so wait for a time alleged or for a reasonable time; such a state of things substantially proved to the satisfaction of the jury, would make out the plaintiff's case and entitle him to recover; the court then referred to the points of the defendants as follows:—

The first two propositions are true, and as general principles are applicable to all classes of this kind, but are chiefly applicable to the pleadings.

The third proposition is predicated upon the supposition that there is no evidence in this case of a stipulation on the part of Hannah Downing to pay the debt in question upon more certain or definite terms, than waiting or forbearing for a time, or some time, or a longer time, in which case the plaintiff would not be entitled to recover. But I have already said that there is a sufficient cause of action laid before you in the

declaration, a forbearance for a reasonable time, or a time certain or indefinite, and as there is evidence fairly before you, from the consideration of which it is your duty to determine whether the cause of action is substantially proved—this proposition cannot be affirmed as stated.

It is for you to say whether the parol evidence by Jesse Cook or Joel Funk, or either of them substantially prove the contract stated in the declaration and thus supplies "all the definiteness and certainty required in such cases."

The plaintiff having declared upon a joint contract cannot recover by proof of a several one. But I cannot say there is no evidence to support the allegations of a joint contract except that of Jesse Cook. The whole deposition of Joel Funk is before you, and from it also you are to judge whether a joint or several contract is proved: all the evidence is before you, and from it you are to judge whether the contract is proved substantially as laid.

There is evidence before you in support of the averment in the declaration. I cannot say there is no evidence.

Assignment and specification of errors.

1st. The court erred in not laying down the law as requested in writing by the counsel for the defendant below, on the points submitted by him.

*2d. The court erred in their charge to the jury upon those points. [*73]

3d. The court erred in charging the jury that the promise given in evidence would, in point of law, bind the defendant below.

4th. The plaintiff in error assigns the general errors

It was argued by *Lewis* for the plaintiff in error, who cited 2 Stark. Ev. 45; 3 Penn. Rep. 285; 1 Watts, 434

Dillingham, contra, referred to Cro. Jac. 683; 4 Wash. C. C. R. 151; Com. Dig. act. ass. B. 1, 298; 4 Johns. 237; 2 Binn. 506; 5 Serg. & Rawle, 519; 1 Penns. Rep. 383.

Tilghman argued in reply.

[Downing *v.* Funk.]

The opinion of the court was delivered by

Gibson, C. J.—Some of the principles discussed here are not embraced by the assignment of errors; and as they have recently been settled in Clarke *v.* Russel at the last term for the Western District, I shall consider but the points immediately raised on the record. These arise not so much out of principles, as their application to the evidence. The consideration laid in the first count is forbearance for a reasonable time; and in the second, for an indefinite time. To maintain these allegations, the testimony of two witnesses was adduced; the first of whom proved a promise to pay if the plaintiff "would give time," and, in a subsequent part of his examination a promise to pay if "longer time" were given. In common parlance, the words longer time are as indefinite as the word time without an adjunct; and they are equivalent to it in strict meaning, the adjunct being redundant. The other witness testified to a promise to "wait," without any adjunct whatever. The popular sense of this last word, when used nakedly, and in reference to a debt, is precisely that of the word forbear, which, when unqualified by terms of restriction, has regard to a general forbearance. To the first prayer for a direction that definiteness and certainty, as opposed to the vague and the general, are necessary in the terms of any consideration, the judge responded in substance, that a promise to pay in consideration that the plaintiff would wait, forbear, or give time, indefinitely or for a reasonable time, at the instance and request of the defendant, would maintain the declaration. There certainly was no error in that; and the application of the principle he left on the evidence, to the proper judges of the meaning of the words. He went further, and intimated that a suspension of the right to sue the original debtor ought to be an ingredient in the consideration—a position not sustained in Clarke *v.* Russel, as proper to be taken unless where the defendant's promise, and not performance of it, is relied on as the consideration. He undoubtedly went as far in the defendant's favour, without trenching on the province of the jury, as the facts would permit.

[Downing *v.* Funk.]

*The counsel prayed a further direction; that a stipulation to pay on terms no more definite than waiting or forbearing for a time, or giving time, or a longer time, would not entitle the plaintiff to recover; and that the testimony of the two witnesses did not supply the certainty necessary in such a case. The abstract proposition, thus put, was affirmed; and its dependence on the evidence for matter of fact, was properly left to the jury. It is to be remarked that nothing was said by the witnesses about waiting for a time, or giving some time; and that but one of them spoke of a proposal to give longer time. The same witness, however, testified in another part of his examination, that it was to give time generally; and the other witness, instead of the words "give time," used the word "wait," which has, in country parlance, the same signification. There was evidence, therefore, on which the jury might find a promise in consideration of forbearance which was determined in Hamaker *v.* Eberly, 2 Binney, 510, to be equivalent to general forbearance; and as it does not seem to have been a point of defence at the trial, that the forbearance was not in fact at the instance and request of the defendants, we cannot entertain an objection on that ground here. The residue of the prayer—to say whether there was evidence of a joint promise—was properly denied, as one of the witnesses asserted it positively, and the other less pointedly; after which the matter became a question exclusively for the jury. [*74]

Judgment affirmed.

Cited by Counsel, 7 W. & S. 430.
Cited by the Court, 9 W. & S. 53; 2 Barr, 31.

[*75] *[PHILADELPHIA, FEBRUARY 2, 1835.]

The Commonwealth *ex relatione* James Leslie *against* The County Commissioners.

Where there is any doubt as to the validity of an election, the court will not interfere by *mandamus*, but will put the parties in the first instance to an information in nature of a *quo warranto*.

A disorder having arisen at a ward election for assessors and inspectors of the general election, the constable of the ward and the persons alleging themselves to have been chosen judges, adjourned the election from the usual place designated in the constable's notice to a neighbouring house, where the relators had the highest number of votes, and were returned by the constable as duly elected. The electors who remained at the usual place designated in the notice, elected judges, and held an election without calling in the overseers of the poor or other persons pointed out by the act of assembly. The persons here elected were returned by the judges to the county commissioners as duly elected.

Held, that both elections were illegal: and that this being a case of failure to elect, assessors were properly appointed by the county commissioners.

The commissioners have power to inquire into the regularity of a ward election; and the constable's return is not conclusive on them.

THIS was a rule to show cause why a *mandamus* should not issue to the commissioners of Philadelphia county, commanding them to receive the return of the assessment made in Locust ward by James Leslie, Vollum, and Sullivan, to make payment to them of the amount prescribed by law for their services in that behalf, and to appoint as collector of taxes in said ward, one of the individuals returned to them by said Leslie, Vollum, and Sullivan.

To this rule the commissioners made return that they had duly recognized and appointed John Rutherford, Senior, John Benner, and Barnet Quinn as the assessor and assistant assessors of the said ward.

This case grew out of a contested election for assessors and inspectors held the 3d October, 1834, in Locust ward.

The facts as stated in the return of the commissioners were as follows:

On the 16th of September, 1834, Daniel B. Lippard, constable of the said ward, in conformity with the directions of the

[The Commonwealth *ex rel.* Leslie *v.* The County Commissioners.]

act of assembly, gave notice that an election would be held at the house of James Hutchinson, on Friday the 3d October, for one assessor and two assistant assessors for said ward, for the ensuing year, and two inspectors for the general election.

Two sets of returns were entered in the commissioners office, one signed by Samuel Reess, Jacob Gress, and Robert Miles, who returned that an election held pursuant to public notice at the house of James Hutchinson on the 3d October, John Rutherford was duly elected assessor, and James M. Linnard and John Benner assistant assessors.

*Another return signed by Lippard, the constable of the ward, Lane Schofield and James G. Caldwell as judges, certified that James Leslie had received the highest number of votes for assessor, and Henry Vollum and Nathan P. Sullivan the highest number for assistant assessors. [*76]

The return of the commissioners further stated, that the electors of Locust ward assembled at the place designated by the constable, and at 2 o'clock P. M. on the 3d October, 1834, chose the judges of the election. Who these judges of the election were, it had been impossible to ascertain with certainty. On the opening of the polls, or while preparations were making for it, much confusion and disorder arose, and a number of persons forcibly and violently interfered with the due opening of the polls. These persons with the constable of the ward, and the two citizens whom they alleged to have been elected judges, opened polls at a neighbouring house, and there impartially and tranquilly elected the persons mentioned in their return. That the electors who continued at the place designated in the public notice by the constable, proceeded in the election impartially and tranquilly, and elected the persons mentioned in the return first above referred to. That the public exigencies requiring them to act without delay, they had chosen the persons mentioned by them in their return.

Cause was shown against the rule by *Dallas* (Attorney-general,) referred to Purd. 233, sec. 1; act of 19th of March, 1824, Ib. 259; act of 15th of April, 1834; Pampl. laws of 1833–4, p. 538, sec. 2, sec. 81, sec. 87.

[The Commonwealth *ex rel.* Leslie *v.* The County Commissioners.]

Meredith and *Scott* argued in support of the rule.

The opinion of the court was delivered by

ROGERS, J.—A rule has been obtained on the commissioners of the county of Philadelphia, at the instance of James Leslie, to show cause why a *mandamus* should not issue, directing them to receive the return of the assessment made in Locust ward, by James Leslie, Henry Vollum, and Nathan P. Sullivan; to make payment to said persons of the amounts prescribed by law for their services as assessor, and assistant assessors, of said ward; and to appoint as collector of taxes in said ward, one of the individuals returned to them for that purpose, by said Leslie, Vollum, and Sullivan. Cause has been shown, the grounds of which are stated at large in the return of the commissioners to the rule.

For the relator to succeed in this application, it must clearly appear that the assessors *de facto*, were not duly elected; for if it were a doubtful election, a *mandamus* ought not to be granted. I do not take into view, that the assessors *de facto*, were not parties to this rule, as we shall consider the case in the same light as if the rule was amended by the insertion of their names on the record. *But still the objection re- [*77] mains, that when there is any doubt of the validity of the election, the court will not interfere by *mandamus* but will put the party in the first instance to an information in nature of a *quo warranto*. Before a *mandamus* would be granted against the commissioners, we should require that there should be a judgment of *ouster* against those who were actually performing the duties of the office. And this would be a sufficient answer to the rule; for here it is plain, that the election or appointment of the officers *de facto*, is not apparently such a one as is merely colourable and void. Rex *v.* Bankes *et al.*, 3 Burr. R. 1454.

But we do not intend to rest the case on this ground, as the effect would merely be to turn the relators round to a new proceeding. This course would not meet the wishes of either party.

I shall examine the case in two points of view. 1. What is

the title of the relators; and 2d, the title of the respondents, and by respondents I mean the officers *de facto*, to whom the commissioners directed their precept, and whom we take to be parties to the rule.

I must first premise, that as a prerequisite to the issuing of a *mandamus*, it must appear not only that the respondents have no title, but that the relators have. The writ is grounded on the suggestion of their own right. It cannot be claimed as a right that the court is bound to issue a *mandamus* to compel the commissioners, for instance, to pay money for services rendered as assessors, when they are not legally such, nor even colourably so. And this makes it our duty to inquire by what title the relators claim to be assessors. The counsel for the relators rest their pretensions on the return of the constable, made in pursuance of the 4th section of the act of the 11th of April, 1799. The act directs that the constables holding elections shall make a return thereof, signed by the judges, within ten days, to the commissioners of the proper county, &c., who shall file the same in their office. They contend that the commissioners are compelled to receive and file the return of the constable, and to issue their precept to the persons therein named, to make the assessment. But conceding that the commissioners have no discretion in relation to the return, (a point which I shall hereafter notice,) yet it is not perceived how this helps the relator's case, unless it can be also shown that the return is conclusive on the Supreme Court, and that in fact there is no tribunal in the commonwealth competent to examine into, and correct gross fraud or illegality of procedure, on the part of the returning officer. It is in vain to deny, that this court have a superintending power by information, to examine and correct abuses in such cases, and I cannot conceive how this can be done in many cases unless we go behind the return. It is not sufficient that forms have been observed, but it is necessary to its validity that the election shall have been conducted in the manner prescribed by law. By the return of the commissioners in which the facts are stated, with the requisite clearness and precision, it *appears that the constable, in pursuance of the direc- [*78]

tions of the act of assembly, gave notice of the time and place of holding the election. That the electors assembled at the time, and the place designated, that being the place generally used for the purposes aforesaid; that much confusion and disorder having aisen, the constable and the two persons who it was alleged were elected judges, removed the election from the place designated, and opened the polls at a neighbouring house; at which place the relators had the highest number of votes, and were returned by the constable and judges as duly elected assessors of the ward. The change of place was the act of the constable, or of the constable and judges; and if such authority is vested in him or not, it must be by virtue of some act of assembly which has not been produced. The only mode in which the place can be altered, is by force of the act of the 15th of April, 1807, which makes it lawful for a majority of the qualified electors present at any meeting held at the usual place for electing assessors or inspectors, or other township officers, to change the place of holding said election to any suitable or convenient house, best adapted for the convenience of the inhabitants of the respective townships. Now whether the majority present would have had the right to adjourn the election it is useless to determine, as there is no evidence of an overwhelming necessity; nor is there any allegation that any vote was taken to ascertain the wish of the electors. We are therefore of opinion, that the relators were not legally elected, and have no title to the office of assessor, and this is of itself a decisive answer to the rule for a *mandamus*.

I shall now proceed to examine the respondent's title; and by the respondents, as before intimated, we mean the persons appointed assessors by the commissioners. In discussing the question, it will be necessary to inquire what rights were acquired by the election held at the proper place. For after the secession of the constable, the electors who remained elected judges, who held an election at the usual place designated by the constable, and who returned to the commissioners that John Rutherford, James M. Linnard, and John Benner, had received a majority of votes, stating the number each had received, and that they were duly elected assessors for the ward.

[The Commonwealth *ex rel.* Leslie *v.* The County Commissioners.]

This was a proceeding wholly unwarranted, for there is no law which authorizes an election under such circumstances, and in the manner above stated. For the 2d section of the act of the 15th of February, 1799, prescribes that if any constable shall neglect or refuse to perform the duties required of him by that act, he shall forfeit the sum of fifty dollars; and in case of neglect, refusal, death, or absence from the county, of any constable or constables, the overseers of the poor of the township, ward, or district. When there shall be no overseer of the poor, in such cases the supervisors of the highways shall perform the duties required to be done by the constable, &c. This act relates to the election of inspectors; but by *the 3d section of the act of the 11th of April, 1799, the [*79] constable is directed to hold the elections; and the elections are ordered to be holden under the same regulations as inspectors for the general election are directed to be chosen. It is then clear, that on refusal, or neglect of the constable, the overseers of the poor, or in default of an overseer of the poor, the supervisors of the highway, or in the city the street commissioners, who take the place and perform the duty of supervisors, should have been called in by the electors to conduct the election. In default of such an officer, no judges could be properly chosen, nor legal election held. This then is a failure on the part of the electors to elect; and the 87th section of the act of the 15th of April, 1834, provides, that if the electors of any township shall fail to choose an assessor or assistant assessor, at the time appointed by law, or if any person elected to such office shall neglect or refuse to serve therein, or if any vacancy shall happen therein by death or otherwise, the commissioners of the county shall appoint a fit person to fill the office, who shall have the same powers, be subject to the same penalties, and receive the same compensation, as if he had been elected, &c. This act should receive a liberal construction, and if there is a failure to elect for any cause whatever the power to appoint (for without it the public would be deprived of these important officers) devolves upon the commissioners. On the ground that there had been no election, the commissioners appointed the respondents assessors for the

ward, and in this we conceive they exercised a duty imposed upon them by the act. But the counsel for the relators contend, that the commissioners were bound to receive and file the constable's return, and that it was their duty to issue their precept to the persons returned by him as duly elected. Without adverting particularly to the form of the return, it must be observed that two returns were made, and it was for them to decide which return was correct, or whether either of them should be received. As it is made the duty of the commissioners in a certain event to appoint, that seems necessarily to imply the power to inquire whether the event had taken place, on the happening of which it became their duty to act. It is a startling doctrine, that in case of a notorious fraud, or a palpable violation of the law, a constable could palm an officer on the public by the force of his return. That by merely omitting to state the place where the election was held, he could control the election, when it was admitted that it was not, in fact, held at the place appointed by the act. If this be the law, it is useless to go through the mockery of an election. The constable may return whom he pleases, always taking care that his return is correct upon its face. It would be better to give the appointment to the constable at once, without the useless ceremony of an election. The act admits of the construction which we have given to it, nor do we perceive any danger in committing to the commissioners the power to examine into the illegality *of elections conducted as this has been. The election is local, but the commissioners represent the whole county. They may be fairly supposed, as in some measure exempt from the feelings which act on the electors of the ward or township, and therefore a reasonable hope may be entertained of something like impartiality. If, however, this hope should fail, the aggrieved party may resort to an information, when the whole case will be examined and right and justice done.

[*80]

In the course of the argument, reference was made to the act of the 19th of March, 1824, but that act only gives jurisdiction to the Quarter Sessions, in the case of a contest with respect to the election of county commissioners, auditors, and

[The Commonwealth *ex rel.* Leslie *v.* The County Commissioners.]

other county officers. An assessor is not a county, but a township officer, a distinction plainly marked in the various acts of assembly, and particularly in the act of the 15th of April, 1834, entitled an act relating to counties and townships, and county and township officers.

Rule discharged.

Cited by Counsel, 1 C. 26; 4 C. 110; 6 Wr. 362; 16 S. 136; 4 O. 228, s. c. 12 W. N. C. 506; 10 W. N. C. 500.
Cited by the Court, 6 W. & S. 398; 7 Barr, 44.

[PHILADELPHIA, FEBRUARY 2, 1835.]

Smith *against* Bonsall.

IN ERROR.

A will of lands may be given in evidence on proof of its execution, notwithstanding a verdict and judgment in an issue of *devisavit vel non* from the Register's Court, against the validity of the will.

ERROR to the Common Pleas of *Delaware* county.

This was an ejectment for an undivided third part of a tract of land in Delaware county.

The plaintiff claimed as one of the heirs of Eliza Ann Smith, who died, seized of the premises in question, without issue, leaving as heirs at law, the plaintiff and two sisters, Margaret, intermarried with Job H. Terrill, and Kitty E. Smith.

The defendants proved by the subscribing witnesses, a paper purporting to be a will of the said Eliza Ann Smith; by which she devised and bequeathed all her estate real and personal, to the said Margaret Terrill and Kitty E. Smith, during their natural lives, and after the decease of the survivor of them, to her nieces Emeline and Ann Louisa Terrill, in fee simple.

*The competent understanding of the said Eliza, and her unbiased determination as to testamentary provisions, was also proved by several witnesses. [*81]

The defendants' counsel then offered in evidence the said paper, as the last will of the said Eliza: which was objected to by the plaintiff, who gave in evidence in support of the objection, the proceedings of the Register's Court of Delaware county, upon a caveat filed by Thomas P. Smith, the plaintiff, against the probate of the said paper writing, directing an issue to try the validity of the said will: and the record of the Court of Common Pleas on the issue, in which the verdict and judgment were for the said Thomas P. Smith.

The court overruled the objection, and admitted the paper as the last will of the said Eliza Smith; to which admission the plaintiff excepted.

The court charged the jury that the verdict and judgment in the feigned issue were *prima facie* evidence of the fact found by that verdict—the invalidity of the alleged will—but that the *prima facie* evidence had been rebutted by the testimony now adduced, and that the verdict and judgment were not conclusive, because the evidence then before the jury might have been, and probably was much weaker, and less sufficient than the evidence now produced.

The verdict was for the defendants.

The plaintiff in error assigned for error, the admission of the paper writing in evidence as the will of Eliza Ann Smith, notwithstanding the proceedings in the Register's Court and Court of Common Pleas—the instructions of the judge in the charge, that the verdict and judgment of the Common Pleas were not conclusive as to the validity of the alleged will: and that the *prima facie* evidence of the said verdict and judgment had been rebutted by the testimony given on the trial, that testimony being directed only to the fact of the actual and voluntary execution of the paper, and the sanity and competent understanding of the testator.

Dick, for the plaintiff in error.

The proceeding before the register to establish the will, was a proceeding *in rem*, and therefore, the judgment or decree rendered is conclusive on all the world, unless it can be impeached for fraud or collusion. 1 Stark Ev. 241, (3d Am. ed.;) 17 Serg.

& Rawle, 143; 2 Rawle, 178. The English doctrine, that the probate is conclusive only as to personal property, rests on the ground that the ecclesiastical courts have no jurisdiction of real property. 1 Stark. Ev. 231, note 1. But here the register has jurisdiction of wills, in respect to real as well as personal estate, and therefore, the decree must conclude as to lands as well as chattels. The act of 1705, 1 Smith's Laws, 33, sec. 1, requires that wills shall be proved and *recorded or entered in the register general's office, in order to pass [*82] lands, and the second section of the same act provides for the recovery of property, taken or detained under wills disproved or annulled within seven years. He referred also to the act of 31st August, 1778, 1 Sm. L. 465, and the 7th sec. of act of 13th April, 1791, 3 Sm. L. 34.

To pass lands in Pennsylvania, a will must be proved before the register. It cannot be established in this collateral way. Taggart *v.* Toner, 5 Binn. 496, 498. Lands cannot be claimed through a disproved will. The will in this case has been disproved. Walmesley's Lessee *v.* Read, 1 Yeates, 87, the leading case on the other side, is a *nisi prius* decision, and ought not to be considered as establishing the law on this point.

Mr. *Dick* then examined the cases, 3 Binn. 498; 4 Serg. & Rawle, 193; 5 Serg. & Rawle, 212; for the purpose of showing that the question could not be considered as settled.

Tilghman, contra,—contended that it was well settled in this state, that the probate though conclusive as to personal, was only *prima facie* evidence as to real estate, and cited Walmesley *v.* Read, 1 Yeates, 87; Coates *v.* Hughes, 3 Binn. 506; Spangler *v.* Rambler, 4 Serg. & Rawle, 193; Logan *v.* Watt, 5 Serg. & Rawle, 212. To entitle either a will or a deed to be read in evidence, it is only necessary to prove the execution of it on the trial. There is nothing requiring it to be registered or recorded before it can be given in evidence.

Sergeant replied, and referred to 10 Wheat. 468.

The opinion of the court was delivered by

KENNEDY, J.—In this case three errors have been assigned;

there is however but one question, and to this they all have relation. This action, which is an ejectment, was brought by the plaintiff in error, in the court below, to recover land claimed by him as one of the heirs at law of Eliza Ann Smith deceased. On the trial of the cause, it was admitted that he was one of three, who were all the heirs that the deceased left at the time of her death. The defendants claimed the possession of the land under an instrument of writing, purporting to be the last will of the deceased, which they alleged was duly executed by her in her lifetime; and after producing two credible witnesses, who testified to the fact, they then offered to read the same in evidence to the jury. It was objected to by the plaintiff's counsel, who showed that after the death of Eliza Ann Smith an effort had been made to prove and establish the same instrument of writing as her last will and testament, by producing it to the register where a *caveat* was entered, and the matter brought before the Register's Court, by which an issue *devisavit vel *non* was sent to be tried in [*83] the Court of Common Pleas, between Kitty E. Smith plaintiff, and the plaintiff in this case defendant, on trial whereof a verdict was given in favour of the present plaintiff against the will, which was accordingly rejected and condemned by the Register's Court. But the court below being of opinion that the defendants were not concluded by the decision of the Register's Court, overruled the objection and admitted the writing to be read in evidence. And whether it was properly received in evidence is the only question to be decided. That a will proved before the register or the Register's Court and recorded in the register's office, is not thereby conclusively established, so far as lands or real estate are concerned, has been settled and recognized in a train of cases that cannot now be controverted or overturned. Some of them are in print, of which the first is Cook *v.* Brown, decided at Carlisle, in 1774, and given by Mr. Justice Yeates in his report of Walmesley *v.* Read, 1 Yeates, 87; in which the probate of a will on a *caveat* filed, and hearing before the deputy register and assistant justices was held to be only *prima facie* and not conclusive evidence as to real estate. So in Walmesley *v.* Read, tried at

Newtown, before Chief Justice M'Kean, and Justice Yeates, in 1791, upon its being objected, that a copy of a will, the probate of which, after a *caveat* filed and a verdict of a jury upon an issue of *devisavit vel non* in its favour had been established by the Register's Court, ought not to be admitted in evidence, but that the original and the subscribing witnesses thereto, who were said to be still in full life, ought to be produced and the execution of the will proved by them, the court after overruling the objection and permitting the will to be read in evidence, said: "the copy of the will as proved under the feigned issue, has been rightly suffered to be given in evidence to the jury in pursuance of the express words of the act of assembly of the 4th of Ann., but that there is nothing in this act compared with and restrained by that of the 10th of Ann. or the act of 1780, creating the Court of Errors and Appeals, or in the act of the 13th of April, 1791, or in any other act that we know of, which shows an intention of the legislature, that such a probate should be conclusive evidence of a will of lands. This court cannot wish the law were so. Suppose the utmost integrity and ability to be possessed by every register, they are still subject to error; and even if the fullest hearing has been had of all the contending parties, which is not generally the case, still new evidence and additional circumstances may turn up, which would weigh greatly in the scale of justice. We are of opinion that the plaintiff in the present instance, may give evidence of insanity, duress, forgery, fraud, undue influence, &c., in or upon the testator." In Coates *v.* Hughes, 3 Binn. 506, the court say it has been held as to personalty the probate is conclusive; as to realty it is only *prima facie*, and it was so settled in Vangordon *v.* Vangordon, where the probate was held to be only **prima facie* evidence. Again in Spangler *v.* Rambler, 4 Serg. & Rawle, 193, the [*84] court lay it down that, "with regard to personal estate the decision is absolute; but the verdict on the issue (meaning the issue directed by the Register's Court to be tried in the Common Pleas, to determine the validity of the will), is not considered as conclusive, with respect to real estate. The party who is dissatisfied may have the title tried in an ejectment."

Likewise in Logan *v.* Watt, 5 Serg. & Rawle, 213, the same position is repeated by Mr. Justice Duncan, in delivering the opinion of the court, who says, "in Pennsylvania the probate of a will devising lands, is *prima facie* evidence." From these authorities and the general and unqualified terms in which it has been so often decided and laid down, that the probate of a will as to lands in Pennsylvania is not conclusive, it would seem to be the natural if not the necessary conclusion, that the decision of the register or the Register's Court is only so, whether it be for or against the validity of the will: it would be somewhat anomalous I apprehend if it were otherwise.

It has, however, been argued that all these decisions and *dicta* of the courts and judges, were made and delivered in cases, where the wills had been approved by the register or the Register's Court, and that there is no case to be found in which the paper purporting to be a will, after being condemned by the register or Register's Court, has been adjudged admissible in evidence, on the trial of a cause, in order to establish a right to the land devised by it, upon making proof first by two credible witnesses of its due execution by the testator. That to do so, would militate against the express declaration of the act of 1705, on the subject of wills, which requires, as is alleged, that every will must first be recorded in the register's office, before it can be received in evidence as such. For this the first section of the act is relied on, which is as follows: "all wills in writing wherein or whereby any lands, tenements, or hereditaments within this province, have been, are, or shall be devised, being proved by two or more credible witnesses, upon their solemn affirmation, or other legal proof in this province, or being proved in the chancery of England, and the bill and answers transmitted hither, under the seal of that court, or being proved in the Hustings or Mayor's Court in London, or in some manor court; or before such as have, or shall have power in England or elsewhere, to take probates of wills, and grant letters of administration, and a copy of such will with the probate annexed, or indorsed, being transmitted hither, under the public or common seal of the courts or offices where the same have been, or shall be taken, or granted, and

recorded or entered in the register-general's office in this province, shall be good and available in law for the granting, conveying, and assuring of the lands or hereditaments thereby given or devised, as well as of goods and chattels thereby bequeathed: and copies of all wills and probates under the public seals of the courts or offices, where the same have been, or shall be taken, or granted *respectively, other than copies or probates of such wills as shall appear to be [*85] annulled, disproved, or revoked, shall be judged and deemed, and are hereby enacted to be matter of record, and shall be evidence to prove the gift, or devise thereby made." Now it is evidently a misapprehension of the terms, and also, as I think, of the true meaning of this section of the act, to say that it requires a will which is proved within the state, to be recorded before it shall be admissible as evidence; for it is not wills but the copies of such wills, with the probates thereof, as shall be proved abroad, in England or elsewhere, and shall be transmitted hither, under the public or common seals of the courts or offices, where the same shall be taken, that are directed to be recorded, or entered in the register-general's office. With regard to the proving of wills within the state, the act merely declares, that, "all wills in writing, wherein or whereby any lands, &c., have been, or shall be devised, being proved by two or more credible witnesses, upon their solemn affirmation, or by other legal proof in this province," (now state,) without saying when, where, or before whom, such proof shall be made, "shall be good and available in law, for granting, conveying, and assuring of the lands, &c., thereby given or devised." Such being the terms and the direction of the act, it is difficult to imagine why the proof of the will should not be made for the first time, on the trial of an ejectment, for the land devised by it, as well as at any other time or in any other place: indeed it would rather seem, in the absence of all positive direction in the act as to this point, to be the most suitable time and occasion, according to the rules of the common law, to make such proof of the will. But the clause of the act, in respect to the recording of copies of wills, has been adjudged to be merely directory and no wise necessary to be

complied with, even to make such copies evidence. In Morris *v.* Vanderen, 1 Dallas, 65–6, where the plaintiff produced the probate of a will, under the seal of the prerogative court of Canterbury in England, to prove title to the lots in question, in those under whom he claimed, the probate not being recorded in the register's office, was objected to by the defendant's counsel, but the court held it was admissible evidence and accordingly received it.

It has also been said, that to admit a writing purporting to be a will, that has been condemned by the register or Register's Court, to be proved and given in evidence on the trial of an ejectment for the land thereby devised, is against that clause of the section already recited, which declares that, "the copies of all wills and probates under the public seals of the courts or offices, &c., other than copies of probates of such wills as shall appear to be annulled, disproved, or revoked, shall be deemed, &c., matter of record, and shall be good evidence to prove the gift or devise thereby made." But it is very apparent that this clause has no application whatever, to the original wills themselves being proved, and given in evidence [*86] on the *trial of a cause involving the question of right to the land thereby devised, but merely to the copies under seal, &c., of such wills as had been previously admitted to probate, and making them good evidence to support the gift or devise therein contained, unless the originals thereof had been subsequently to their probate annulled, disproved, or revoked, in the manner mentioned in the second section of the act; so that wills which never have been admitted to probate, or have been condemned and rejected when offered for that purpose, are not embraced, nor intended to be so by this clause or part of the act.

Having answered the objections attempted to be raised against the decision of the court below from the terms of the act of assembly relative to wills, it may not be improper to ascertain the character and efficacy given by the act itself to wills devising lands. It declares that all wills in writing whereby lands are devised, being proved by two or more credible witnesses in this state, without directing how, in what

manner, or before whom this proof shall be taken or made, shall be good and available in law for the granting, conveying, and assuring of the lands thereby devised. Thus in terms giving to them the character and efficacy of conveyances, in addition to the peculiarities belonging to them as wills, which exempt them from some of the rules, to which deeds of conveyance are subject at common law: and in this light and character, they were viewed and considered by this court in Girard *v.* The City of Philadelphia, 4 Rawle, 323. The act then having prescribed no particular mode or manner in which wills devising lands shall be proved by two or more witnesses, the common law, in order to carry the provision of the act in this behalf into effect, will supply the omission, by permitting and enabling the party claiming land under a will, to prove it according to the principles of the common law, as he would a deed of conveyance, by two or more witnesses, where he claimed under it. It is true that the probate made before the register of a will devising lands will entitle it, or a certified copy of it from him under his hand and seal of office, without further proof of its execution, to be read in evidence; but there is no authority whatever for this in the act of assembly. It is a rule founded on practice; and I presume, grew at first out of the authority given the register to take probate of wills, for the purpose of granting letters testamentary thereon, which related merely to the personal estate of the testator. So a will disposing of land proved by two witnesses before a justice of the peace of the county where the land was situate, has been admitted in evidence. Lessee of Sharp *v.* Petit, 4 Yeates, 413. Looking upon it merely as a conveyance, this possibly, without stretching the recording acts too much, might be covered by them, but practice I believe has been considered the ground of its authority.

In the cases referred to, in which it has been held or said that the *probate of a will respecting lands taken before the register or the Register's Court was not conclusive, certainly no distinction was taken between the effect of a decision approving the will and one condemning it. But in Spangler *v.* Rambler, 4 Serg. & Rawle, 193, the late [*87]

Chief Justice in what he says evidently had reference to a decision as well against as for the will. His words are "with regard to personal estate the decision is absolute, but the verdict on the issue (meaning of *devisavit vel non*) is not considered as conclusive with respect to real estate. The party who is dissatisfied may have the title tried in ejectment." The term "party" here plainly means either, and that the one or the other party as he may happen to be dissatisfied, may test the validity or invalidity of the will in an action of ejectment, so that he must have entertained the opinion that a person claiming land under a will which had been condemned by the register or the Register's Court might afterwards try the validity of it in an action of ejectment. I am also inclined to believe that the same opinion has ever been pretty generally received by both judges and lawyers in this state; and that the practice has been to some extent in accordance with it. In Sharp *v.* Petit, 4 Yeates, 413, although it is stated in the marginal syllabus of the case that the will was registered, yet that does not distinctly appear from the report to be so: still it is possible it was the fact; but when we consider that the will uniformly remains with the register after being recorded, and that on the trial of Sharp *v.* Petit a third subscribing witness to the will, who had not proved it before the justice of the peace, was produced in court, and testified to the execution of the will, the conclusion would rather seem to be that the will was still in the possession of the party and produced by him in court for the inspection of the witness, who could not have testified well without its presence. So, from Robinson *et al. v.* Robinson, mentioned by Messrs. Ingersoll and Sitgreaves, counsel for the plaintiffs in Walmesley *v.* Read, 1 Yeates, 88, 9, it most clearly appears that the defendant gave in evidence in support of his right to the land in dispute, a will which had been condemned and rejected by the Register's Court. The cause was tried at Reading, November assizes, 1781, where the plaintiffs claimed under a will dated in 1769, which was regularly proved, and letters testamentary issued thereupon. The defendant made title under a deed from his father dated in 1772, and a second will in the

same year in confirmation of it, which had been set aside on hearing before the register and assistant justices in 1774, and the whole facts respecting the sanity of old Israel Robinson at the time of the execution of the deed, and the second will, were fully investigated.

At this time I recollect one case, and only one, which came under my own notice when at the bar. It was an ejectment brought and tried in the Court of Common Pleas of Fayette county by the Lessee of A. Murdock *v.* Miller and others. The plaintiff claimed the land in dispute under a will alleged to have been duly made by the *testator in his lifetime, but lost after his death without being proved. On the [*88] trial he offered evidence to show the existence, due execution, loss, and contents of the will. Mr. Campbell, counsel for the defendants, objected to the evidence being given, not on the ground that the will had never been proved before the register or Register's Court, but because, if it ever existed and was lost, being in law a conveyance and a link in the plaintiff's chain of title to the land, it fell directly within the provisions of the acts of the 28th of March, 1786, and 19th of January, 1793, empowering the Supreme Court, and the Courts of Common Pleas within this state, to supply defects in the titles to lands occasioned by the loss of deeds or writings respecting the same: that the loss of the will supplied in the manner prescribed by these acts would have been more safe as well as better evidence than that offered; and that the plaintiff was therefore bound to resort to that mode of establishing the will, otherwise he could not give evidence of it. The court on the authority of Hamilton *v.* Van Swearingen, Addis. 48, accordingly overruled the evidence, which compelled the plaintiff to take a non-suit. Hence I infer that Mr. Campbell, who was not only of a very discriminating mind, but a good lawyer, and had, for years before that, been engaged in an extensive practice of the law, considered it no objection to the will being proved on the trial of the cause, that it had never been proved before the register or the Register's Court. Indeed it may perhaps be doubtful whether the register or the Register's Court, have any power to supply the loss of a will devising

land by receiving evidence of its execution and contents, and making a record thereof so as to make the same evidence on the trial of an ejectment or other action involving the title to the land. The acts of assembly last mentioned, seem to provide only for cases of loss which happened prior to their passage, and if so, I am inclined to believe that a party claiming land under a will lost, without being proved and recorded, since the date of these acts has no way by which he can establish the will but by the production of witnesses to prove it on the trial of the cause, or by filing a bill to perpetuate testimony and proceeding to have the evidence taken under it. Besides, other exigencies may occur which would prove fatal to the right of the party claiming land under a good will, unless he can commence and maintain actions of ejectment without having probate first made of it before the register or the Register's Court, or be permitted to do so after the will has been condemned by the Register's Court, without waiting until he can have it established upon an appeal to the Supreme Court. Suppose, for instance, a testator devises his lands, of which adverse possession has been had for nearly twenty-one years, but before probate can be made of the will that period will have run; the consequence will be, that unless the devisee can commence and maintain his action of ejectment before probate, he must be barred of his right under the will by the statute of limitations. If he must delay commencing his suit [*89] *until he can have the will admitted to probate in the Register's Court, and put on record, years may elapse before he can bring his action, for the question of will or no will, may be taken from the register to the Register's Court, where the trial of an issue sent to the Common Pleas may have to be waited for, and after that the decision of the Register's Court is had, the matter may be carried by appeal to the Supreme Court, where a further delay of one or two years may have to be encountered, before the proof of the will is finally established, so as to have it recorded in the register's office. The Register's Court may decide against the will, and the Supreme Court in favour of it, and to say that the devisee during all this time, shall not be permitted to recover the possession of

the land devised to him by action, it being withheld, would indirectly be deciding that the will shall not take effect immediately upon the death of the testator, though the law has ever been considered otherwise. If the devise of the land be a fee simple interest, vested in possession, the right of possession as well as that of property passes to the devisee the instant that the testator dies; and thus he becomes invested with the right of entry into the land, or a right to bring and maintain an action of ejectment to recover the possession of it if withheld from him; but if he is not permitted to exercise this right, then he has a right without a remedy, which cannot be. *Lex semper dabit remedium*, is the maxim of the common law; and our constitution declares that every man for an injury done him in his lands, &c., shall have remedy by the due course of law, and right and justice administered without denial or delay: but if the delay attending the probate should happen to be such as to permit the statute of limitations to become a bar to the devisee's right, it could not be considered anything short of an absolute denial of justice, and would seem to contravene the provisions of the constitution.

It also appears to me that it would scarcely comport with the spirit and genius of our law in regard to land titles to hold that the decision of a register or a Register's Court unappealed from, whether in favour of or against a will devising lands, shall be final and conclusive upon all concerned. There is certainly no other species of writing, under which a party can claim title to land, that he has not a right to have at least two trials in ejectment brought for the land, where a full opportunity will be afforded upon each trial of testing its validity; and nothing short of two decisions against him by a court and jury in such actions will conclude him. A deed, for instance, under which a plaintiff in ejectment claims the land, may be denied, and yet notwithstanding the jury, under the direction of the court, on the trial of the first action, pronounce it a forgery, and on that ground find a verdict against him, he may if he thinks the first decision wrong, bring a second action of ejectment and submit the validity of his deed with all, and

new, and additional evidence if he has it, to the decision of another jury, who will not be bound *by the decision [*90] of the first jury, and if they should be satisfied from the evidence adduced that the deed is good, ought to find in his favour. Then why should a will devising lands be made an exception, seeing that it is of quite as much importance as a deed conveying them can be, and that the execution of it is much more likely to be attended with circumstances which may render a close, diligent, and scrutinous examination necessary in order to determine whether it really be the last will of the testator or not. I confess that I am unable to perceive any good reason why as much latitude should not be allowed in this respect to a party claiming under a will as under a deed.

But it has been said, that as the probate of a will in regard to personal estate is conclusive upon all persons, so it ought to be in respect to real; because the value of the former, disposed of by will, is frequently much greater in amount than that of the latter. Admitting this to be true, still it does not furnish a sufficient authority for courts in this state to disregard the great care and concern uniformly evinced by the legislature over real estate, beyond what they seem to have discovered for personal, in all their acts on the subject. By the act against frauds and perjuries they have placed a guard around the owners of land, to protect them in the enjoyment of their rights to the same, as well as to prevent them from making an indiscreet and incautious disposition thereof, by requiring that all rights to lands, excepting leases not exceeding the term of three years, shall be acquired and transferred in writing signed by the party disposing of the same; leaving personal estate and the rights thereof to be disposed of by delivery merely under verbal agreements as at common law. So by the act of 1705, on the very subject of wills now under consideration, in order to pass the right to land it is made necessary, as we have seen, that they should be in writing, while personal property to any amount may be given and disposed of by nuncupative wills or word of mouth. We have

also stated already that a party claiming a right to land is not bound and concluded by one decision alone of a court and jury given in an action of ejectment against him, but may if he chooses have a second trial and investigation of it in a new ejectment brought by him for that purpose; whereas one decision in any form of action is conclusive in regard to a right to personal estate however great the value or amount may be. Again, justices of the peace have a limited jurisdiction given to them by acts of assembly over rights to personal property, but in no case whatever can they take cognizance of a matter in which the right to land or real estate will come in question. They to be sure may by act of assembly take probate of deeds conveying lands, but then such probates are but *prima facie* evidence of such deeds having been executed, and not conclusive. And no doubt this is going a sufficient length; first because there may be and generally is no opportunity afforded by notice to all concerned of contesting it; and, second, because the interest and intricacy of the questions involved *are generally too important to be committed to the decision of a justice of the peace so as to make it conclusive. And here, in illustration of the case before us, let us suppose a deed of conveyance were offered for probate before a justice of the peace, and after hearing the proof he should be of opinion, that the execution of it had been unfairly obtained, and therefore reject the proof and the deed; it would scarcely be contended, I apprehend, that the party claiming under the deed in case of an ejectment brought afterwards by him to recover the land conveyed by it, ought to be precluded from showing on the trial of the cause that his deed was good, notwithstanding it had been shown to have been rejected, or in other words, condemned by the justice when offered for probate before him. And indeed I am far from being satisfied that the most, if not all I have just said in regard to justices of the peace and their taking probate of deeds is not equally applicable to registers and Register's Courts, and their taking probate of wills devising lands. [*91]

Upon full deliberation, after examining the question pre-

sented to us in all its various bearings, I think the judgment of the court below right, and that it ought to be affirmed.

Judgment affirmed.

Cited by Counsel, 2 Wh. 88; 3 W. & S. 442; 14 S. 222, 439; 11 N. 507.
Approved in 6 Barr, 441.
Cited by the Court, 8 Barr, 423; 7 H. 490; 8 H. 293.

[PHILADELPHIA, FEBRUARY 2, 1835.]

Craig *against* Craig.

IN ERROR.

In an action to recover contribution, brought against a co-obligor in a bond, the defendant agreed to submit to the obligee the decision of the fact of payment to him, of the bond by the plaintiff.

Held, that counter declarations of the obligee, whether in conversation or on oath, were admissible to show his want of good faith or of memory.

A receipt purporting to be for a sum equivalent to the defendant's proportion of the debt, given by the obligee, is not evidence of exoneration against a co-obligor in an action to recover contribution.

Statements by a witness at another time, though admissible to contradict, are not equally so to confirm him.

This is the general rule. But consonant declarations may be given in contradiction of evidence, tending to show that the testimony at the bar is a fabrication of recent date, and to show that the same statement was made before its ultimate effect on the question trying, could have been foreseen.

Proof of payment in money is not absolutely indispensable to sustain a count for money paid, laid out, and expended. Per Gibson, C. J.

Payment by a surety before the maturity of the debt, is not necessarily voluntary. Per Gibson, C. J.

An obligor to whom the bond has been delivered by the obligee on a promise of payment, actual or conditional, may, on actual payment in pursuance of his promise, maintain an action for contribution against his co-obligor.

THIS was a writ of error to the Common Pleas of *Northampton* [*92] county. The action was *indebitatus assumpsit*, brought by Charles against Thomas Craig, to recover one-half of two bonds, each in the sum of three hundred dollars, in which they were jointly bound to their father, General Craig: the whole of which Charles alleged that he had paid. The declaration contains counts for money paid, laid out, and

expended: for money lent and advanced: and for money had and received. The plea was *non assumpsit.*

This cause was before the court on a former writ of error, [see 3 Rawle, 472,] when the judgment of the court below was reversed, and a *venire facias de novo* awarded. The record being remitted, it came on for trial again on the 23d April, 1833.

Two witnesses, Dr. John Boyd and Frederick Hyneman, to whom the dispute between the brothers was referred, deposed that Thomas Craig had told them, that if General Craig would say he had received the amount of the bonds of Charles, he, Thomas, was ready and willing to pay his share. They further testified to various declarations made by General Craig, in their presence and hearing, relative to payment by Charles.

The defendant afterwards offered in evidence, the contents of a deposition of General Craig, taken on the 13th February, 1827, as his declarations, for the purpose of proving mistake or *mala fides* in him, at the time of the supposed declarations, made before Dr. Boyd and Mr. Hyneman. To the admission of this in evidence, the plaintiff objected: first, because it purported to be a deposition taken under a rule of court, and was not filed according to the rule: secondly, because it was taken when the cause was pending before arbitrators. The court sustained the objection, and rejected the evidence, which form the subject of the first bill of exceptions.

The defendant then offered to prove by C. Beitel, the declarations of General Craig, made in his presence, purporting that he had not received payment of these bonds from Charles, for a similar purpose, to the admission of which in evidence the plaintiff objected, for the reasons already stated; and because the alleged declaration was an irregularly taken deposition in the cause, which had already been overruled. The court sustained the objection, and sealed a bill of exceptions.

The defendant then offered in evidence the deposition of General Craig, taken on the 17th of January, 1829, to the admission of which the plaintiff objected, because it was taken after the former trial, and on a motion for a new trial; and

taken to be read on the argument of that motion; and because the subject-matter of the deposition was not evidence. The court rejected the evidence; to which decision the defendant excepted.

The defendant then offered in evidence the deposition of General Craig, in connection with the evidence of Charles Deshler, as the declarations of General Craig: and also offered to prove by C. Davis and C. J. Beitel, General Craig's declara-
[*93] tions, for the purpose of *showing mistake or *mala fides* in his supposed declarations, before Boyd and Hyneman, to the admission of which the plaintiff objected, and was sustained by the court. These formed the subject of the fourth, fifth, and sixth exceptions.

The defendant then offered in evidence the deposition of General Craig, taken on the 7th July, 1830, in this suit, as between the same parties, and in relation to the same subject-matter. The court sustained the plaintiff's objection to the admission of this evidence, and sealed a bill of exceptions.

The defendant then offered in evidence two receipts from General Craig to Thomas Craig, the first dated 30th August, 1823, for one hundred and fifty dollars, on account of the bond due 1st May next. The second dated 9th November, 1825, being an acknowledgment that two bonds, one for three hundred, and the other for two hundred dollars, had been previously paid, for the purpose of showing that Thomas Craig had been exonerated from liability on these bonds. The plaintiff objected to the admission of these receipts in evidence, and the court sustained his objection. The receipts were as follows:

Lehigh Gap, August 30, 1823.

Received of Thomas Craig, Jr., the sum of one hundred and fifty dollars, in full, for his part of a bond due the 1st of May next.

T. CRAIG.

Allentown, November 9th, 1825.

I hereby acknowledge to have received of Thomas Craig, Jr., his full proportion of two bonds executed by the said Thomas Craig, Jr., and Charles Craig, and payable to me,

one for three hundred dollars, and the other for two hundred dollars; which bonds were by me left in the hands of Charles Craig.

T. CRAIG.

The plaintiff then offered in evidence the declaration by General Craig, dated May 12th, 1823, in the Common Pleas of Lehigh county, to obtain a pension under the provisions of the act of Congress of 18th March, 1818. Also, his declaration dated 28th January, 1822, to obtain a pension, made in the Common Pleas of Northampton county, which were offered in evidence, for the purpose of showing that in January, 1822, General Craig stated that he had the bonds in controversy; and that in May, 1823, he stated that he had sold them in payment of his debts, and to show conformity with the decision made in the presence of Boyd and Hyneman. The defendant objected to the admission of these declarations in evidence; and thereupon, the court excluded all of the paper dated in January, 1822, except so much thereof as describes the bonds in the possession of Thomas Craig: and also excluded all of the paper dated in May, 1823, except so much thereof as states and shows what disposition the said Thomas Craig made of the said bonds. The court also admitted in evidence the dates of the papers, and the occasion *on which the declarations [*94]
therein contained were made; to which decision the defendant excepted.

The plaintiff then offered to prove by a witness that on the 15th of December, 1823, when all matters in variance were submitted to the witness and two others, the plaintiff produced the bonds in question, and the defendant objected to their being taken into consideration because they were not then due, and also said that the plaintiff had paid nothing for them. And upon that occasion General Craig said in the presence of both parties, "Charles has satisfied me for those bonds. Tommy, you know nothing about it." The arbitrators then handed them back to Charles, and said, "These you keep; when they come due they will speak for themselves. We cannot take them into consideration now." And upon that

occasion Charles exhibited the vouchers at Thomas's request, showing how he had satisfied the bonds. To the admission of which in evidence the defendant objected, because they were not the declarations of General Craig made at the time when Thomas agreed to refer it to the decision of his father; that Thomas dissented, that the acts or declarations of the arbitrators in relation to the bonds were not evidence, nor was evidence of the production of the vouchers competent. The court, however, overruled the objection, and admitted the evidence, and likewise the evidence of another of the arbitrators last mentioned, and of a similar nature. This formed the subject of the 10th and 11th exceptions.

The defendant then again offered in evidence the three depositions of General Craig, before offered, which were objected to by the plaintiff, and rejected by the court. To this decision the defendant excepted.

The defendant's counsel then requested the answer of the court to the following points, in their charge to the jury:

1. Can the plaintiff recover in this action, unless he has proved the payment of money?

2. If the plaintiff voluntarily paid more than his portion of the bonds before they fell due, is he entitled to recover in this action?

3. Did not the surrender of the bonds to Charles, without payment and without consideration, *ipso facto*, put an end to all liability of the obligors on these bonds? And can any payment which Charles may have made in pursuance of, or in compliance with any promise, undertaking, or understanding between him and his father, at the time of such surrender, give him any cause of action against Thomas, to recover any part of what he so paid?

4. If the jury believe that General Craig surrendered these bonds to his son Charles, upon the consideration that the said Charles had promised to pay the amount of the said bonds to him if he should want it; or in confidence that they would not suffer him to want, the plaintiff cannot recover in this action.

[*95] *In answer to the first point proposed by the defendant's counsel, the court instructed the jury, that the

plaintiff could not recover unless he had proved to their satisfaction, that he had paid to General Craig the amount of the bonds in question. It was not necessary, however, that he should do this by positive testimony; he might establish it in the same manner that any other fact may be proved.

Answer to the second point. If the plaintiff, being one of the co-obligors, did pay the money to General Craig before the bond came due, he is entitled to recover of the defendant his share of the money, after the time mentioned for the payment of the bonds has expired, and not before.

The third and fourth points were answered by the court in the following manner:

If General Craig delivered these bonds to Charles Craig, as a gift, without the payment of the money, or a promise or undertaking to pay the same by Charles Craig; or if General Craig surrendered them to Charles, and depended upon his honour to pay, or that Charles would not let him suffer, and without any legal obligation on the part of Charles to pay the same, then the plaintiff cannot recover, although he subsequently paid the amount to General Craig. But if these bonds were delivered over to Charles Craig, upon his promise or undertaking to pay the amount to his father, and if he has paid the amount, then after the bonds became due, the plaintiff can maintain this action to recover of the defendant his share; or if the bonds were delivered to Charles upon his conditional promise or agreement to pay upon the happening of a certain event, and that event did happen, and Charles paid the money, he can recover.

To which opinion of the court the defendant, by his counsel, excepted, and requested the same to be filed.

The following errors were assigned:

1. That the court erred in rejecting the evidence mentioned in the first bill of exceptions.
2. The same as to the second bill of exceptions.
3. The same as to the third bill of exceptions.
4. The same as to the fourth bill of exceptions.
5. The same as to the fifth bill of exceptions.
6. The same as to the sixth bill of exceptions.

7. The same as to the seventh bill of exceptions.

8. The court erred in rejecting the two receipts mentioned in the eighth bill of exceptions.

9. The court erred in admitting the evidence mentioned in the ninth bill of exceptions.

10. The same as to the tenth bill of exceptions.

[*96] *11. The same as to the eleventh bill of exceptions.

12. The court erred in rejecting the evidence mentioned in the twelfth bill of exceptions.

13. The court did not answer the first point submitted to them by the defendant.

14. The court erred in their answer to the defendant's second point.

15. The court erred in their answer to the defendant's third and fourth points.

The case was argued by *Jones* and *Wharton* for the plaintiff in error; and by *Brooke* and *Porter* for the defendant in error.

The opinion of the court was delivered by

GIBSON, C. J.—The position of General Craig in relation to the parties was a peculiar one. It was submitted to him, rather as a witness than an arbitrator, to say the truth between them; and though his declaration was adopted by the unsuccessful party beforehand so far as to affect him, it was held when the cause was here before to be open to be disproved, just as the award of an arbitrator or the testimony of a witness may be disproved, by evidence of mistake or corruption. Putting him then in the attitude of a witness or an arbitrator, his want of memory or good faith can be evinced in no way more satisfactorily than by evidence of counter declarations whether in conversation or on oath. Proof of self-contradiction, under whatever sanction or circumstances, must necessarily detract from his credibility. It seems to be of little account, therefore, that his several depositions would be inadmissible independently of the attitude in which he was placed by the appeal to his veracity; or that these were not regularly taken as original proofs in the cause. The voluntary affidavit of a witness may be introduced to discredit him; and though

these depositions were not competent evidence of the facts asserted in them, they were competent to show that General Craig had given contradictory statements of the same transaction. For the same purpose his sayings and doings before the magistrate or elsewhere, though not inserted in the paper, were also admissible; and this disposes of the first six bills of exceptions to evidence.

His two receipts given to the defendant stand on different ground. They were offered not as acts which might be inconsistent with his statement to the arbitrators; nor as evidence of payment in fact of which, except against the obligee or his assignee, they would not be competent; but as acts of direct exoneration. Granting them, for the moment, to have the force of an acquittance, would the fact however proved be a defence to the action? The release of one joint obligor discharges the other; and had the plaintiff paid with notice that he was discharged by the complete exoneration of his *co-obligor, he certainly would not be suffered to call [*97] for contribution. If, however, the defendant, in whose knowledge the transaction peculiarly lay, suffered him to pay in ignorance of it, he could not say that the payment was merely voluntary; and this might have furnished matter for an inquiry by the jury. But the receipts do not purport to have exonerated the defendant from further payment. The obligor barely acknowledged the receipt of a sum equivalent to the defendant's proportion of the debt; and does such an acknowledgment change the terms and effect of the bonds by which he was bound for the whole? Or can it supply the want of operative words of release? If it cannot, the receipts can be evidence of exoneration *pro tanto*, but as evidence of payment. Actual payment of the defendant's proportion would be an answer to a demand of contribution; but it could not be proved by the acts or admissions of the obligee to affect the plaintiff who claims not by substitution to him, but on his own original right as a joint obligor. Whether the receipts might not be competent to contradict the obligee's assertion of payment by the plaintiff, is a question which was not made below, the evidence having been proposed to the court in a different point

of view; but which may be readily answered in the affirmative.

But statements by a witness at another time, though admissible to contradict him, are not equally so to confirm him. They are certainly not receivable before his credibility has been assailed; but it is a vexed question whether they may not be used to rebut evidence of self-contradiction by showing him to have been sometimes consistent. The affirmative is supported by a number of respectable authorities, the principal ones of which are Lutterel *v.* Reynell, 1 Mod. 282; Freind's Case, 4 State Tr. 613; Wright *v.* Deklyne, Peters's C. C. Rep. 203, and Gilb. Ev. 135; opposed to which stands the doubt of Mr. Justice Buller in his law of Nisi Prius, 295, as well as the opinion of Lord Redesdale, together with his assertion of a decision to the same effect by Chief Justice Eyre, as stated in a note to 1 Starkie's Evid. 187. Mr. Phillips speaks doubtingly (vol. 1, p. 230), but inclines to the affirmative; and Mr. Roscoe (p. 96) seems to incline the other way. Mr. Starkie positively asserts the negative as the general rule; yet admits that such confirmatory evidence may possibly be made competent by circumstances. Thus it stands between jarring authorities; but on principle the question would not seem to be susceptible of any great degree of difficulty. Though usually called confirmatory, these consistent statements are universally agreed not to be admissible in chief, but only to rebut other contradictory statements; and if merely corroborative of the testimony in chief, why should they not be received before the credibility of the witness has been impeached? As rebutting, it cannot be pretended that they disprove the fact of contradiction, or that they remove the imputation of inconsistency; for it follows not, *because the witness had sometimes told the tale delivered by him at the bar, that he had never told a different one. If it be supposed that they rebut the inference to be drawn from the fact of contradiction by decreasing its force, they still leave the witness more exposed than ever to the charge of vacillation; and how he is confirmed by being left in a predicament so unfavourable to his veracity, it is not easy to comprehend. Adopting then the rule of Mr.

[*98]

Starkie with its exception, that consonant declarations may be given in contradiction of evidence tending to show that the testimony at the bar is a fabrication of a recent date; and to show that the same statement was made before its ultimate effect on the question trying could have been foreseen, we come to an inquiry into the time and circumstances of the declarations made by General Craig to entitle him to the benefit of the pension laws. These were made in 1822 and 1823—the last on the 12th day of May in that year. The earliest information we have of a contest between the parties, is given by William Craig, who testifies to an inquiry by the defendant, in the October following, into the real state of the transaction, in consequence of an intimation that the plaintiff was about to sue him. At this time, for aught that appears, General Craig was in harmony with the parties; and his previous statements while his passions and prejudices were in a state of repose, and especially when he could not have foreseen the existence of the present controversy, or the bearing which his declarations might have on it, are indisputably within the exception to the general rule. These declarations were therefore properly admitted; and for the same reason it would seem that his declarations before the arbitrators in 1823, were admissible, though certainly entitled to less consideration by the jury.

The exceptions to the charge are not sustained. Proof of payment in money is not absolutely indispensable to a count for money expended to the defendant's use; though it must be admitted that the only exception recognized in the books, is the case of payment in negotiable paper. But the direction on this head, was in substantial accordance with the prayer. As to the position taken, that payment before the bonds fell due, would be essentially voluntary, it is proper to remark, that the principle was ruled differently in Armstrong *v.* Gilchrist, 2 Johns. Ca. 429, where it was held that a guarantee of a note who had compromised and paid it for his own indemnity before it had become due, was entitled to recover. That a surety is to wait till payment is extorted from him, is not pretended; but it is said that payment before maturity is necessarily vol-

untary; and that eventual liability is not equivalent to a precedent request. There is no authority for that; and it seems not to be defensible on principle. Why may not a surety take measures of precaution against loss from a change in the circumstances of his principal, and accept terms of compromise before the day, which may *not be attainable after it. [*99] He may ultimately have to bear the burthen of the debt, and may therefore provide for the contingency by reducing the weight of it. Nor is he bound to subject himself to the risk of an action by waiting till the creditor has a cause of action. He may, in short, consult his own safety and resort to any measure calculated to assure him of it, which does not involve a wanton sacrifice of the interest of his principal. If then General Craig delivered these bonds on a promise of payment absolute or conditional, there cannot be a doubt that actual payment in pursuance of it, would entitle the plaintiff to contribution. All that can be said is that it could not have been enforced before the bonds were due.

Judgment reversed, and a *venire de novo* awarded.

Cited by Counsel, 5 Wh. 297; 5 W. & S. 527; 8 H. 310; 20 S. 403; 3 N. 120; 10 N. 147; 6 W. N. C. 313.

Approved in 6 Barr, 429, and 3 S. 498.

Cited by the Court, 7 W. 202; 4 O. 37, s. c. 12 W. N. C. 249.

[PHILADELPHIA, FEBRUARY 2, 1835.]

Hodgson, Administrator of Boyd, with notice to Joseph Hodgson, terre tenant, *against* Gemmil, Administrator of Eliza Gemmil, late Hodgson.

IN ERROR.

Testator devised to each of his grandsons, A. and B., a tract of land in fee simple, from and after their arriving at twenty-one years of age respectively, when they were to have possession of the land: subject each to the payment of a sum of money, making together four thousand dollars, on their arriving at age; which sum he bequeathed to his four granddaughters to be equally divided amongst them and paid by his grandsons as they arrived at twenty-one years of age respectively.

[Hodgson Adm. *v.* Gemmil.]

One of the granddaughters attained the age of twenty-one years after A. had arrived at majority, but during the minority of B. Her personal representative after B.'s coming of age brought an action for her proportional part of the legacy charged on B.'s land. Held, that he was entitled to recover.

THE defendant in error who was the plaintiff below, brought this action in the Common Pleas of *Chester* county to recover a legacy charged by the will of James Boyd on land devised to Joseph Hodgson his grandson, in favour of Eliza Hodgson his granddaughter, who intermarried with Hugh Gemmil the plaintiff.

James Boyd, by his last will and testament, proved the 18th day of August, 1821, *inter alia* devised to his grandson James Boyd Hogdson, as follows:—

"Item. To my grandson James Boyd Hodgson, I give and devise the plantation and tract of land on which I live, containing one hundred and fifty acres more or less, together with a lot of woodland, *containing six acres more or less, adjoining lands of John Beachtel and others, to [*100] hold to him, his heirs and assigns forever, from and after he comes to the age of twenty-one years, subject to the privileges which I have given to my beloved wife, and also subject to the payment of twenty-seven hundred and fifty dollars as hereinbefore directed.

"Item. To my grandson Joseph Hodgson, I give and devise all my plantation, situate in upper Oxford township, containing one hundred and fifty acres of land more or less, to hold to him, his heirs and assigns forever, from and after he arrives at the age of twenty-one years, subject to the payment of twelve hundred and fifty dollars as is hereinafter directed, on the day he arrives at lawful age as aforesaid, being the day he is to get possession of said land.

"Item. To my four granddaughters, viz.: Mary N. Montgomery, (before mentioned,) Eliza Hodgson, Jane B. Hodgson, and Mary N. Hodgson, I give and bequeath the aforesaid two sums of money, making together four thousand dollars, to be equally divided amongst them, share and share alike, and paid them by my said two grandsons as my said granddaughters

respectively arrive at the age of twenty-one years, without interest."

Eliza Hodgson intermarried with the plaintiff, and arrived at the age of twenty-one years on the 3d day of July, 1825, and died on the 7th day of February, 1826.

James B. Hodgson attained the age of twenty-one years on the 27th day of March, 1823, and took possession of the land devised to him under the will, and conveyed the same to his father James Hodgson, who as terre tenant was sued and compelled to pay the proportional part of the said legacy of twenty-seven hundred and fifty dollars charged upon the said land in favour of the said Eliza.

Joseph Hodgson attained the age of twenty-one years on the 15th day of October, 1830, and took possession of the land devised to him under the will.

Mary N. Montgomery attained the age of twenty-one years on the 11th day of November, 1832.

Jane B. Hodgson and Mary N. Hodgson are yet in their minority.

This action was brought by the plaintiff below, administrator of Eliza Gemmil, late Hodgson, to recover the proportional part of the legacy charged upon the said real estate devised to Joseph Hodgson, with interest from the time the said Eliza attained the age of twenty-one years.

The judgment of the court below was in favour of the plaintiff: whereupon the defendant brought this writ of error.

Lewis for the plaintiff in error.—Joseph being still in his minority when Eliza arrived at twenty-one years of age, and became entitled to receive her legacy, she was bound to look [*101] for its payment to the *land devised to James as her only fund. The will does not provide that the devisees shall each pay an equal fourth part of the sum charged on the land devised to him. He contended that the legacy being charged on the land, and the legatee dying before Joseph came of age, which was the time appointed for the payment, the legacy sunk into the land; and cited, 2 P. Wms. 612, *in notis;* Gordon *v.* Raynes, 3 Ib. 134; Billingsley *v.* Wills, 3 Atk.

219; Bruen *v.* Bruen, 2 Vern. 439, (Raithby's ed.;) Talbot's Cases, 193–5; 6 Cru. Dig. 474, tit. Devise, ch. 18, sections 1, 2, 3, 4; Stone *v.* Massey, 2 Yeates, 363.

Smith and *Dillingham, contra.*—The devise to Joseph was vested and not executory. His interest was immediate, although the possession was postponed till he came of age. Kerlin *v.* Bull, 1 Dall. 175; Goodtitle *v.* Whitby, 1 Burr. 228. He therefore took the land *cum onere*, and the legacy vested immediately.

Here the postponing the payment was evidently owing to the circumstances of the estate; and for the convenience of Joseph, and not personal to the legatee: and therefore, according to the established exception, the legacy must be raised. Lowther *v.* Condon, 2 Atk. 127. They further cited 1 Vern. 329; Talbot's Cases, 117; 2 Vern. 617; 2 Atk. 507; 3 Ib. 319; 1 Dall. 8.

The opinion of the court was delivered by

KENNEDY, J., who, after stating the facts, proceeded as follows:—It is contended that the court below ought to have given judgment in favour of the plaintiff in error. First, because the testator having directed that the four thousand dollars should be divided equally among his four granddaughters, and paid by his two grandsons to them, as they respectively attained the age of twenty-one years; and the twenty-seven hundred and fifty dollars charged on the land devised to James B. Hodgson, being the only part of the four thousand dollars which had become payable according to the terms of the will at the time Eliza Hodgson attained twenty-one, the time when she was to receive her legacy or fourth part of the four thousand dollars; that she therefore was bound to look to the land devised to James, as the only fund out of which she could receive her full share of the money; for Joseph not having then attained his age of twenty-one, was not entitled to have possession of the land devised to him, before which he was not bound to pay his twelve hundred and fifty dollars as the residue of the four thousand.

The plaintiff below, before the commencement of this suit, recovered from the alienee of James, one-fourth of the twenty-seven hundred and fifty-dollars charged on the land devised to him, and seeks now to recover only the like proportion of the twelve hundred and fifty dollars, charged on the land devised to Joseph, with interest thereon from the time that Joseph attained his age of twenty-one years.

[*102] *It is perhaps not very distinctly indicated by the terms of the will that the devisees of the land should each pay an equal fourth part of the sum charged on his devise, to each one of the four granddaughters as they respectively should attain the age of twenty-one years, but still I think it will bear such construction without militating in the least against what would seem to have been the intention of the testator as disclosed throughout the will. Joseph is most explicitly required to pay his twelve hundred and fifty dollars on the day he arrives at the age of twenty-one years. Now if it had been the design of the testator that any one of his granddaughters attaining the age of twenty one, before Joseph had arrived at that age, should receive her one-fourth of the four thousand dollars out of the twenty-seven hundred and fifty charged on James's land, it is perfectly clear there was no occasion for the testator requiring as he has, that Joseph should pay his twelve hundred and fifty dollars on the day that he should arrive at lawful age; because the twenty-seven hundred and fifty dollars coming from James, was greatly more than sufficient to pay Eliza the whole of her one thousand dollars; she being the only one of the four granddaughters that could attain full age before Joseph would arrive at it. According to the construction then contended for on behalf of the plaintiff in error, he could not be called on to pay any portion of his twelve hundred and fifty dollars until the money charged upon James's land was exhausted, which is more than sufficient to pay the full shares of the two eldest of the granddaughters in the four thousand dollars; consequently Joseph instead of being liable to pay at his age of twenty-one, upon his taking possession of the land as directed by the will, would not become so before the third eldest of the granddaughters shall have

attained her age of twenty-one, which would certainly be extending to him an indulgence of several years beyond that allowed by the terms of the will. Unless indeed the testator had intended that Joseph should pay to each one of the four granddaughters the one-fourth of the twelve hundred and fifty dollars, and accordingly pay to Eliza her fourth of it on the day he should arrive at lawful age, it is not likely that any part of it would have been made payable at that time, because there would have been nobody then to receive it. And this accounts for the difference of phraseology used by the testator in directing the time of payment by Joseph from that used in the case of James. For James being older than any of the granddaughters, would of course attain his full age before the time at which any of them, according to the will, would be entitled to receive her legacy, and is therefore not required to pay on the day he shall arrive at twenty-one years of age, as Joseph is. It is true that this construction does not make it requisite that Joseph should have paid the whole amount charged on his land at the time of his coming to lawful age, as the letter of the will would seem to require he should; nor can I perceive any construction that *would furnish occasion for it, but it renders it proper that a part of it [*103] should have been paid at that time, and therefore seems to coincide more closely than any other with the intention of the testator as expressed in his will. Hence I think the first objection of the plaintiff in error is not sustainable.

The second is, that if any portion of the legacy bequeathed to Eliza be considered as charged on the land devised to Joseph, that portion of it, whatever it may be, has lapsed and sunk into the land for the benefit of Joseph, inasmuch as Eliza died before he arrived at the age of twenty-one years, the time limited for the payment of it.

It is perhaps not very easy to reconcile all the cases on this subject. But still, notwithstanding the rule may be as contended for by the counsel for the plaintiff in error, where the money charged on the land or to be raised out of it, is intended for a marriage portion or an advancement at a particular age, and the legatee dies before marriage or the time lim-

ited for the advancement being paid, yet if it appears from the whole of the will or any part of it, that the testator intended it should be otherwise, the rule cannot obtain. The reason of the rule, if it has any, seems to be, that if the occasion for which the gift was designed should never happen, the gift itself ought not to take effect. The first and leading case in support of this rule, is Pawlett *v.* Pawlett, 1 Vern. 321; which was followed by Smith *v.* Smith, 2 Ib. 92; Yeates *v.* Phettiplace, Ib. 416; s. c. Pre. Ch. 140; Jennings *v.* Looks, 2 P. Wms. 276; Chandos *v.* Talbot, Ib. 602, 612; Prowse *v.* Abingdon, 1 Atk. 482; Van *v.* Clark, Ib. 510; Gawler *v.* Standerwuke, 1 Bro. Ch. Ca. 106, in note to Green *v.* Pigat, and Harrison *v.* Naylor, 3 Bro. Ch. Ca. 108. If, however, the devise of the land upon which the legacy is charged, becomes vested either in possession or in interest immediately upon the death of the testator, and by the terms of the will is given subject to the payment of the legacy, the legacy must be considered likewise vested; and if the legatee should die before it becomes payable it will pass to his or her representatives; because in such case it is plain, from the terms of the will, that the legatee was as much the object of the testator's bounty as the devisee, and that the testator intended that the latter should take the land *cum onere*. I consider this doctrine fully established by the cases of Hutchins *v.* Foy, Comy. Rep. 716; Hodgson *v.* Rawson, 1 Ves. 44, and Godwin *v.* Munday, 1 Bro. Ch. Ca. 191. In Hutchins *v.* Foy, the legacy was charged on real estate, devised in remainder to Foy, the defendant, to be paid by him upon his becoming entitled to the possession thereof. The niece married a person of the name of Grover, and dying afterwards before the remainder became vested in possession in Foy, Grover the husband took out administration to his wife, and assigned the legacy to the plaintiff in satisfaction of a debt. The legacy was held to be transmissible because the remainder vested immediately in Foy upon *the death of the testator, who according to the will took it *cum onere*, and therefore the legacy became vested at the same time in the legatee. Lord Hardwicke, who recognizes in Hodgson *v.*

[*104]

Rawson, 1 Vesey, 47, the principle upon which the legacy was adjudged to be transmissible in this case, says, "it was held to be transmissible on this ground; that the remainder vested immediately by the death of the testator, and therefore the legacy vested in those to whom payable, and the devisee must take it *cum onere;* it being equally intended that the legacy should be paid as that the devisee should have the estate;" and he accordingly ruled the legacy to be transmissible for the same reason in the case then under his consideration. So upon the same principle was the case of Goodwin *v.* Munday decided. The testator there devised an estate to his second son in fee, after the decease of his (the testator's) wife, with a proviso, that he should pay to the testator's daughter Mary one hundred pounds, to be paid within one year after the death or marriage of his wife; after the death of the testator Mary died leaving the wife still living, and held that it was a vested legacy in Mary, and that upon her death it was transmitted by operation of law to her representatives. Now the case under consideration here is similar in all its leading features to those just noticed, and falls directly within the same class, and therefore ought to be governed by the same rule. That the devise of the land to Joseph Hodgson was a remainder in fee vesting in interest immediately upon the death of the testator, can admit of no doubt, when compared with the cases of Boraston, 3 Co. 19; Webb *v.* Hearing, Cro. Jac. 415; Mansfield *v.* Dugard, 1 Eq. Ca. Abr. 195, pl. 4; s. c. Gilb. Eq. Rep. 36; Hayward *v.* Whitby, 1 Burr. 228; Satterthwaite *v.* Satterthwaite, 1 Bl. Rep. 519, and Kerlin *v.* Bull, 1 Dall. 175. According to the principles laid down in all these cases, an estate in remainder vested in Joseph the instant of the testator's death, subject to the payment of twelve hundred and fifty dollars. He therefore took it *cum onere;* and those to whom the money is directed to be paid, became invested at the same time with the right to receive their respective portions of it when the times limited for the payment thereof should come round. Thus the remainder and the charge upon it vested at one and the same instant, which of itself goes to show that it was equally the intention of the testator that the legacies should

be paid, as that Joseph should have the land. Besides, this construction seems to be necessary in order to carry into effect the plain intention of the testator, as manifested in other parts of his will, which was to divide his estate somewhat equally among his six grandchildren, who would have inherited his estate in equal proportions, as tenants in common, if he had died intestate. That he intended to place his four granddaughters upon an equal footing with his two grandsons, in the distribution of his estate among them, is pretty strongly [*105] evinced by his bequeathing to them *all equally the residue of his personal estate, after making provision for his wife out of it during her life, together with the rents which should be received by his executors from his real estate, up to the times respectively at which his grandsons were to have the possession of it; hence I am inclined to think that the testator believing his two farms, which he devised to his grandsons, could not be divided without injuring the value of them, therefore charged them with the payment of the four thousand dollars to his granddaughters, for the purpose of giving to each of the six an equal portion of his whole estate.

There is also a second ground, if it were necessary to rely on it, upon which the recovery of the plaintiff below, perhaps might be sustained. It would seem according to the principle laid down in King *v.* Withers, Gilb. Eq. Rep. 27, that where a legacy charged upon land depends upon two contingencies, and one of them only happens, it is sufficient to have the legacy raised. This principle is mentioned with seeming approbation by Lord Hardwicke in Lowther *v.* Condon, Barnard, Ch. Rep. 329–30; 2 Atk. 129. Now in the present case it may be said, that by the will the payment of the legacy to Eliza, was made to depend upon two contingencies, that is, the attainment of twenty-one years of age by her, and again the attainment of the same age by Joseph, the devisee of the land; she having attained her age of twenty-one before her death, one of the contingencies at least happened in her lifetime, though the other did not, but has happened since and before the institution of this suit, and therefore the legacy became vested and transmissible.

But there is a third ground upon which the defendant in error is entitled to recover according to the authority of a train of cases that cannot be shaken or questioned. It is evident from the will that the postponement of the payment of the legacy to Eliza from the time she came of full age, until Joseph the devisee should arrive at it, was not on account of the age of Eliza the legatee, but clearly from a regard to the convenience of Joseph himself and the circumstances of the estate charged with the legacy. The time of payment having then been postponed merely for the purpose of favouring Joseph, it would be unreasonable, if not unjust, to hold that the death of the legatee during such indulgence should in effect give the legacy to him to the prejudice of her personal representatives. The first case in which the legacy seems to have been considered vested and transmissible on this ground is King *v.* Withers, Talb. Ca. 117; Pre. Ch. 348, which was affirmed in the House of Lords, 4 Bro. Par. Ca. 228, and recognized by Lord Hardwicke in Lowther *v.* Condon, 2 Atk. 128, 9, as well as acknowledged in the cases of Butler *v.* Duncombe, 1 P. Wms. 457; Pitfield's Case, 2 P. Wms. 513; Hutchins *v.* Foy, 716; Emes *v.* Hancock, 2 Atk. 507; Sherman *v.* Collins, 3 Atk. 322; Hodgson *v.* Rowson, 1 Ves. 44, Jeale *v.* Titchener, Amb. 703; s. c. 1 Bro. Ch. Ca. 120, (in note;) Tunstall *v.* Brachen, *Amb. 167; Dawson *v.* Killet, 1 Bro. Ch. Ca. 119, and many others not necessary to be mentioned. [*106]

The judgment is therefore affirmed.

Cited by Counsel, 2 W. & S. 375; 3 O. 366, s. c. 11 W. N. C. 274.

[PHILADELPHIA, FEBRUARY 2, 1835.]

Wynn, Administrator of Wynn, *against* Brooke and Others.

IN ERROR.

A surety is entitled to reimbursement of the money which he has been obliged to pay for his principal with interest; but he cannot speculate on his principal, and by compromising with the creditor for a sum less than the debt, and taking an assignment of it, compel the principal to pay him the whole amount of the debt. Nor can he, if he has unnecessarily incurred expenses in resisting the claim of the creditor, compel the principal to reimburse him such expenses, even where the engagement is to indemnify the surety and keep him harmless.

Therefore, where real estate had been adjudged by the Orphans' Court to a son of an intestate who became bound, with two sureties, in bonds conditioned for the payment of the respective shares of the other children of the intestate, part of the money to be paid in one year from the date of the bonds, and the residue upon the death of the widow of the intestate (which was charged upon the land), and after the death of the widow, one of the children having brought suit against the administrator of one of the sureties, who, by pleading attempted to postpone the claim of the plaintiff upon the estate of the surety, till resort could be had to the land of the principal, which then had passed into other hands, and afterwards compromised the suit by paying the plaintiff one-half the debt and interest, and all the costs of suit, and at the same time had the suit marked to the use of the intestate, to enable, as the agreement stated "the defendant to proceed against the land, without prejudice to his right as surety," the plaintiff at the same time acknowledging, by an instrument under hand and seal, to have received of the administrator of the surety, full satisfaction for the debt, interest and costs, and in consideration thereof assigning all his right, title, claim, interest, demand, security, and lien upon the land, and all right of action against the then owners or terre tenants and all other securities, &c., for the debt;

Held, that the administrator of the surety could only recover the money actually paid upon the compromise of the debt, with interest, but without any of the expenses incurred in resisting the claim of the creditor.

THIS was a writ of error to the Court of Common Pleas of *Chester* county, in an amicable action of debt instituted by John Wynn, administrator of Jonathan Wynn, deceased, against Clement Brooke, James Johnson, and Margaret Painter.

[Wynn Adm. *v.* Brooke *et al.*]

After argument by *Dillingham* for the plaintiff in error, and *Bell* for the defendants in error, the opinion of the court (which contains a statement of all the material circumstances of the case) was delivered by

*Rogers, J.—This was an amicable action of debt in which a case was stated in the nature of a special verdict, and appears to have been this. [*107]

In the year 1806, the real estate of Ezekiel Thomas, deceased, was upon a valuation adjudged by the Orphans' Court of Chester county, to his son William Thomas, whereupon he with William Vanleer and Jonathan Wynn as his sureties, entered into bonds for the respective shares of the other children of Ezekiel Thomas, deceased, and amongst the rest one to Elizabeth Thomas, afterwards Elizabeth Mervin, in the penal sum of three hundred and five pounds thirteen shillings and four-pence, conditioned for the payment of one hundred and one pounds sixteen shillings and two-pence, in one year with lawful interest, and the further sum of fifty pounds eighteen shillings and six-pence upon the death of Susanna Thomas, the widow of the said Ezekiel Thomas, deceased. The first sum of one hundred and one pounds sixteen shillings and two-pence is admitted to have been paid; but the latter sum of fifty pounds eighteen shillings and six-pence remained unpaid during the life of the widow. The widow having died, Elizabeth Mervin brought a suit against John Wynn, administrator of Jonathan Wynn, upon the bond, which is joint and several, to recover of him as one of the sureties of William Thomas, the latter instalment of fifty pounds eighteen shillings and six-pence, the payment of which had been postponed to the death of the widow. The defendant John Wynn, as administrator of the surety, and who is plaintiff in the present case, resisted the claim of Mrs. Mervin, and among other things contended, that she ought not in equity to proceed against the surety until resort should be had to the land of the principal, William Thomas, which had been sold at a sheriff's sale, and was now owned and occupied by Clement Brooke, James Johnson, and Margaret Painter, the present defendants.

They also contended, that even admitting there was a lien under the act of assembly of 1794, which they denied, yet that the lien was discharged by the sheriff's sale. This defence was the subject of a special plea in bar, to which the plaintiff demurred, and on argument the court overruled the demurrer and gave judgment for the plaintiff for one hundred and seventy-nine dollars and ninety-two cents, including costs. Whereupon the said plaintiff, by the advice of counsel, compromised the claim by the payment of ninety-six dollars and eighty-nine and a half cents on the 7th February, 1832. At the same time the suit was marked for the use of Jonathan Wynn, to enable, as the agreement stated, "the defendant to proceed against the land without prejudice to his right as surety." And Mrs. Mervin further acknowledged under her hand and seal to have received from John Wynn the defendant, (described as John Wynn, administrator of Jonathan Wynn, deceased,) full satisfaction of the debt, interests, and costs, in consideration whereof, she assigns, transfers, and sets [*108] over all her rights, title, claim, interest, demand, *security, and lien, upon the real estate adjudged to William Thomas, &c., and also all her right or cause of action against the present owners or terre tenants of the same real estate, and all other her securities, pledges, liens, or mortgages for the payment of the same debt, of what nature or kind the same may be.

The parties having agreed upon the above points, submitted the questions of law, without regard to the form of action, and the questions were, whether the plaintiff was entitled to recover any, and if so, how much money from the defendants.

The first point has been faintly pressed although open to the defendants, notwithstanding the judgment of the court on the demurrer, in the suit between Elizabeth Mervin and the administrator of the surety. In answer to the defendants' objections, it may be sufficient to observe, that all the questions have been already decided. In Medlar's Executors *v.* Aulenback, it is ruled, that by the act of the 19th of April, 1794, the widow of an intestate has a lien on the lands, taken at the appraisement in the Orphans' Court for the value of her

purpart, the interest to be paid to her during her natural life. And in Fisher *v.* Kean, 1 Watts R. 259, it is also ruled, that the lien on land, which a widow has for her interest, by the intestate laws, is not divested by a sheriff's sale of land upon a judgment whose lien has been subsequently obtained. The same principle will protect the lien of the heirs from the effect of a judicial sale. There is then no doubt that the plaintiff has a right of action, and the only question which remains is the extent of the defendant's liability, and on this branch of the case, two questions have been submitted. First, as to the extent of the defendant's liability on general principles, and secondly, under the peculiar circumstances of the case.

As to the first. It is admitted, that where the surety pays the debt, the law implies a promise on the part of the principal, to repay the money paid, with interest, but it is said that without an express stipulation, that is all he can require. In this position the defendant's counsel are supported by Vance *v.* Lancaster, 1 Hayw. Ten. R. 130; Copp *v.* M'Dugall, 9 Mass. R. 1; and Simpson *v.* Griffin, 9 John. R. 131. In Simpson *v.* Griffin it was decided, that the payee, indorser of a note, who has been sued by the indorsee in default of the maker, cannot compel the maker to pay the costs of such suit. The maker is liable to the payee for the amount of the note only. The mere fact of drawing the note does not imply a promise to save harmless from all costs and charges, that he may be subjected to as indorser. There must be a special promise, to save harmless before the payee can call upon the drawer for costs, accrued by the default of the payee himself. As payee, he can only look to the drawer for the amount of the note. So in Copp *v.* M'Dugall, where an indorser of a promissory note has incurred expenses in a suit against the maker, in which he has failed, the *indorser [*109] is not liable on his indorsement, for these expenses or for any damages beyond the amount of the principal and interest of the note. The case of Smith *v.* Griffen carries the law to a greater extent than it has been perhaps in England, and certainly further than in Pennsylvania, but,

nevertheless, it serves as a strong illustration of the principle of the difference between an implied and express contract. The strictness of the rule as to costs, is intended to enforce punctuality, which is so important in mercantile transactions, and which, perhaps, would not even there be held to extend beyond mercantile paper. In Pennsylvania we have allowed a payee indorser to recover legal costs in addition to the money paid and interest, but this is the extent to which the courts of this state have gone, on an implied promise. Several cases have been cited by the counsel for the defendants, but all of them are on express contracts, to indemnify and save harmless, unless the case *ex parte* Marshall, 1 Atk. 262, is an exception. This case seems not to be fully or accurately reported; but if the expenses which were allowed to be proved under the commission were legal costs, then there is nothing inconsistent with the modern decisions which allow a surety to recover such costs. But if the chancellor means to say that if a surety disputes a just debt, and occasions an expense by that means, he shall charge the estate of the principal with other than the costs of the suit, then I answer, that the case has been overruled in more modern cases. I agree that the surety can recover costs, because it cannot be supposed that a surety is ready at all times to pay the money, and it is but just, that he should recover costs, which have been incurred. as well on account of his principal's default as his own. But it would be going further than good policy requires, to say that other expenses, counsel fees, for example, should be recovered, as that would put it in the power of the surety, to indulge an appetite for litigation at the expense of his principal, and it would be particularly hard, where the surety had not thought proper to give the principal notice of the suit, and of the defence. If the law is, as is contended for by the counsel for the defendants, there is no difference between an implied contract and an express contract of indemnity; and that there is a material distinction between the two, is shown by the cases already cited. Powel *v.* Smith, 8 John. R. 192; Simpson *v.* Griffin, 9 John. R. 131; Copp *v.* M'Dugall, 9 Mass. 1, and Hayden *v.* Cabot, 17 Mass. R. 169. The principle fairly deducible

from the cases, is, that without an express contract of indemnity, a surety who pays the debt of his principal, can only require the money actually paid by him with interest and costs, to be refunded. And here it is proper to notice a position taken by the plaintiff's counsel, who contends, that John Wynn has a right to recover the whole amount of the lien, because he is a purchaser of the whole claim. To this it may be answered that he does stand in that relation, but as the representative of the surety who has paid the debt, *and of course that he can be in no better situation than the surety himself would have been, had he paid the debt. But a surety stands in such a relatiou to his principal, that he cannot be permitted to speculate upon him. [*110]

It remains now, to inquire how far the general principle as above asserted, is affected by the particular circumstances of this case. The defendants purchased the property at a sheriff's sale, subject to a lien of fifty pounds eighteen shillings and sixpence, under the act of 1794, in favour of the widow and heirs. In making the purchase, the presumption is, that an eye was had to this liability, which entered into the price bid for the land. In other words, the purchasers gave one hundred and seventy-nine dollars and ninety-two cents less than they would otherwise have been willing to pay. It is therefore obvious that so far as regards that amount, they are in no better, if so good, a situation as the principal himself. It is also equally plain, that they have not been injured by the compromise, for had no arrangement been made, they would have been compelled to pay one hundred and seventy-nine dollars and ninety-two cents, whereas the sum demanded is only one hundred and fifty-six dollars and eighty-nine cents. By the assignment, John Wynn is subrogated to all the rights of the original creditor, and it cannot be doubted according to the cases cited, that the creditor had a lien on the fund to the whole amount of the judgment on the demurrer. But the defendants allege that although, true it is, they are liable for that sum, yet, that it is inequitable in the surety to exact the whole amount inasmuch as he only paid seventy-nine dollars.

But this allegation can only be made in a court of equity,

and he who asks equity, must do equity; and it seems to us nothing but justice, to compel the defendants to reimburse the reasonable expenses incurred in procuring a benefit of which they seek to avail themselves. It would certainly be just, as between the surety and the principal debtor, and to the amount of the liability of the fund in their hands, there is nothing to distinguish their case from that of the principal debtor.

Judgment reversed, and judgment entered for the plaintiff for one hundred and eighty-three dollars and seventy-six cents.

Cited by Counsel, 8 W. 49; 4 Barr, 117; 7 H. 33.
Cited by the Court, 12 Wright, 90; 7 W. & S. 275.

[*111] *[PHILADELPHIA, FEBRUARY 9, 1835.]

In the Matter of the Inquisition of Escheat of the Estate of Sarah Desilver, Deceased.

IN ERROR.

The feoffment and livery of a lunatic or madman are not void, but voidable: and as they work a divesture of his seisin, they preclude the possibility of an escheat by his death, because seisin must be found at his death, as well as failure of heirs, devisees, or known kindred; and though escheats take effect in Pennsylvania, not on principles of tenure, but by force of our statutes, yet these statutes require the decedent to have been seized at his death.

But a deed of bargain and sale, though by the express words of the statute, it has the force and effect of a feoffment and livery for the purpose "of giving possession and seisin, and making good the title and assurance," is not equivalent in all respects to a feoffment and livery, and if executed by a lunatic or madman, it is void.

Therefore, on the trial of a traverse of an inquisition of escheat, evidence is admissible on the part of the Commonwealth to show the insanity of the decedent at the time he executed a deed of bargain and sale.

THIS case came before the court on a writ of error to the Court of Common Pleas of *Philadelphia* county, in which it was a traverse of an inquisition of escheat, of the estate of Sarah Desilver, deceased, taken on the 12th of November,

[In the matter of the estate of Sarah Desilver.]

1829, and filed with the proceedings of the inquest on the 13th of November, 1829. The traverse was filed by the Rev. Thomas J. Kitts, and the trustees of the Second Baptist Church and congregation in Philadelphia.

The inquest found that Sarah Desilver died on or about the 22d of June, 1828, intestate, without heirs or any known kindred, and that she was at the time of her death seized and possessed of certain real estate, in the county of Philadelphia, particularly described in the inquisition, and that Thomas J. Kitts, of the said county, was the person in whose hands or possession the real estate then was.

Various pleadings took place in the Court of Common Pleas, but by writing filed, dated the 6th of March, 1833, it was agreed that the pleadings should be withdrawn; that every material fact found in the inquisition should be understood to be traversed, and the case tried as if a formal issue had been joined according to the agreement.

On the trial, after the counsel of the traversers had given in evidence the death of Sarah Desilver, a paper writing, purporting to be the last will and testament of the said Sarah Desilver, dated the 8th of December, 1824, and proved the 26th of July, 1828, devising part of the property mentioned in the inquisition to "the trustees of the Second Baptist Church and congregation in the city of Philadelphia, under the ministry of the Rev. Mr. Kitts, and their successors in office forever, for the use of said church, and the residue thereof, to *Thomas J. Kitts, in fee simple," and an instrument, purporting to be a deed, dated the 24th [*112] of August, 1825, acknowledged the 30th of August, 1825, and recorded the 28th of October, 1825, from Sarah Desilver to Thomas J. Kitts, conveying the said estate to Kitts in fee simple, provided that the rents, issues, and profits of the whole estate should, after the payment of ground rents, taxes, and the necessary repairs, be by him, his heirs, administrators, and assigns, well and truly applied to the use of the said Sarah Desilver during her natural life, and provided also that immediately upon her decease he, his heirs or assigns, should make or cause to be made and executed unto the trustees of the

[In the matter of the estate of Sarah Desilver.]

Second Baptist Church, &c., a lawful deed, for a certain part of the property, the same that by the will was given to the church; the counsel for the commonwealth offered to prove that "Sarah Desilver was *non compos mentis* before, at, and after the alleged signing, sealing, and delivery of the said last will and testament," and that she was "*non compos mentis* before, at, and after the alleged signing and execution of the deed as aforesaid, and that the said Sarah Desilver continued to be *non compos mentis* as aforesaid, unto and until the time of her death, as aforesaid." The evidence thus offered being objected to by the counsel of the traversers, was rejected by the court. The counsel of the commonwealth "further offered in evidence the fact, that the said Thomas J. Kitts, for a long time before and until the death of the said Sarah Desilver, acted as, and was her sole agent, and admitted her to be in the possession of the real estate in the said inquisition mentioned and set forth." This evidence was also objected to on the part of the traversers, and rejected by the court, who sealed a bill of exceptions on both points.

The jury returned a verdict in favour of the traversers, whereupon a writ of error was sued out, on which the record was brought into this court, where errors were assigned in the rejection by the court below, of the evidence offered on the part of the commonwealth, as above stated.

Rush, *H. J. Williams*, and *Dallas*, for the commonwealth.
Grinnell and *P. A. Browne*, for the traversers.

The opinion of the court was delivered by

Gibson, C. J.—The authorities distinctly show that the feoffment and livery of a lunatic or madman are not void but voidable, and that as they work a divesture of his seisin, they preclude the possibility of an escheat by his death, because seisin must be found by the inquest, as well as a failure of heirs, devisees, or known kindred. His feoffee holds discharged, because an avoidance of the act would not restore the seisin of the lunatic, at the time of his death, which is essential to an escheat of his estate to the immediate lord of

[In the matter of the estate of Sarah Desilver.]

the fee. It is true that our property is allodial, and that *escheats with us, take effect, not upon principles of tenure, but by force of our statutes to avoid the uncertainty and confusion, inseparable from the recognition of a title founded in priority of occupancy; yet these statutes equally, and in terms, require the decedent to have been seized at his death. So far the argument made for the defendant in error, seems to be unassailable. The defect in it is, that it fails to prove the deed of bargain and sale, by which he holds, to be equivalent in all respects to a feoffment. It is not a feoffment in form or in fact, nor has it all the qualities or consequences of one, as was determined in M'Kee's Lessee *v.* Pfouts, where it was not suffered to work a forfeiture like the feoffment of a tenant for life. But granting it, as it undoubtedly has by the express words of the statute, the force and effect of a feoffment and livery, for the purpose of "giving possession and seisin, and making good the title and assurances," yet in order to do so, it must be a deed; for the legislature certainly never intended to impart the prescribed effect to an act *in pais* which should at the same time be a nullity. At common law the feoffment of a madman, as shown by the argument, is only voidable, but his deed is absolutely void; so, that unless we can infer a legislative design, to alter the common law in the latter particular, we must hold that his conveyance by bargain and sale is void, and unattended with the consequences attempted to be attributed to it. This design could be inferred, but from the clause which gives a deed of bargain and sale, the force and effect of a feoffment in "making good the title and assurance." But, in that respect, it must, in M'Kee's Lessee *v.* Pfouts, have created a tortious fee in the grantee, and produced a forfeiture of the grantor's life estate: a consequence which was denied to it. The obvious purpose of the provision was to dispense with actual investiture, without imparting to its substitute the feudal and almost inconceivable effect of displacing lawful estates and turning them to a mere right; or giving to it any quality or consequence beyond the one specified. The object was to give without the aid of feudal ceremonies, the legal seisin for lawful purposes. In [*113]

[In the matter of the estate of Sarah Desilver.]

treating the conveyance therefore, as an actual feoffment, which transferred the seisin without regard to the sanity of the grantor, the judge who tried the cause gave it an effect, never intended to be imparted to it. The capacity of the Commonwealth to contest its validity, was settled in Crawford *v.* The Commonwealth, 1 Watts, 484, where she was adjudged to be the *ultima hæres;* and succeeding as such to the rights and remedies of the heir and next of kin, she may, on the strictest principles of the common law, be let in to show the grantor's insanity.

Judgment reversed, and a *venire de novo* awarded.

Cited by Counsel, 2 Barr, 170; 4 W. & S. 194; 7 C. 169; 7 S. 104; 28 S. 411, s. c. 1 W. N. C. 585; 2 W. N. C. 674.
Cited by the Court, 6 Barr, 374.

[*114] *[PHILADELPHIA, FEBRUARY 9, 1835.]

Lewis *against* Baker.

IN ERROR.

The inability of a witness to answer an improper question cures the error in allowing it to be put.

ERROR to the Common Pleas of *Delaware* county.

It was a feigned issue to try the validity of the will of Azariah Lewis.

On the trial of the cause in the court below, Hannah Lewis, wife of Eli Lewis, was asked if her husband had told her at any time of a conversation he had with Robert Lewis, the plaintiff, about the will. The witness replied that he did tell her of a conversation with Robert Lewis. Mr. *Tilghman*, counsel for the plaintiff, objected to the witness stating what the conversation was. The objection, however, was overruled by a majority of the court, and the evidence admitted, to which admission the plaintiff excepted, and the court sealed a bill of exceptions.

The witness proceeded to testify as to what her husband had said. He said "Robert and him had had one of their long

talks, when he came home. The reply he made was, it was a little masonry, and not for woman to know. He believed it was Robert's will they had been signing, and not uncle's. He did not tell me the conversation between him and Robert; nor I never knowed it, nor never asked him—not till since uncle's death. Eli told me that night, he would not for a twenty-dollar bill have put his hand to that paper."

The plaintiff in error assigned for error,

1st. The majority of the Court of Common Pleas erred in allowing Hannah Lewis to testify and give in evidence the matters contained in the bill of exceptions.

2d. The general errors.

3d. The judgment below should have been entered in favour of the plaintiff.

Tilghman, for the plaintiff in error, cited 1 Stark. 152, 334; 3 Stark. 1692; 4 Serg. & Rawle, 499; 3 Serg. & Rawle, 269; 1 Stark. 148, 149.

Kittera, contra, referred to 11 Serg. & Rawle, 362.

J. R. Ingersoll, in reply, referred to 1 Pow. on Dev. 643; 1 Phillips Ev. 421; 2 Caines, 178; Roscoe Ev. 96; 1 Phillips Ev. 212, 230.

Per Curiam.—The objection made at the trial was a specific one, and directed against the introduction of the supposed relation *by the witness's husband, of the matter of a conversation had by him with the plaintiff about the will, and the objection being overruled, it came out that the witness had not been told what the conversation was. Having said that her husband had told her of a conversation with Robert Lewis, Mr. Tilghman objected to the witness's stating what that conversation was; being allowed to relate it, she said, "He did not tell me the conversation between him and Robert, nor I never know'd it, nor never asked him till since uncle's death." Is not that the very case of Allen *v.* Rostain, 11 Serg. & Rawle, 362, where it was held that the inability of [*115]

a witness to answer an improper question, cured the error in allowing it to be put? It is true the witness here, added other matters that were possibly inadmissible; but these were suffered to pass without exception, and they cannot be made the subject of error here.

Judgment affirmed.

Cited by Counsel, 2 Wh. 81; 3 Wh. 324.

[PHILADELPHIA, FEBRUARY 9, 1835.]

Schieffelin *against* Kessler.

IN ERROR.

Testatrix bequeathed a fourth of the residue of her estate to the defendant, in trust to appropriate, apply, and dispose of the same in such way and manner and for such uses and purposes as her daughter H., notwithstanding her coverture, by writing under her hand, attested by two or more subscribing witnesses, might direct, limit, or appoint, and to and for no other use, intent, or purpose whatever.

H. died during the life of the testatrix, leaving children surviving her of whom the plaintiff was one.

Held, That the legacy would have vested absolutely in H. upon the death of the testatrix had she survived her; and that its lapsing was prevented by operation of the act of 19th March, 1810, and the plaintiff entitled to recover his share in severalty.

THIS was a writ of error to the District Court for the city and county of *Philadelphia*.

The case was this.

Mary Kessler executed and published on the 24th of November, 1815, her last will and testament, which, after several specific bequests, contained the following residuary bequest:—

"And all the rest, residue, and remainder of all my estate whatsoever and wheresoever, I give and bequeath the equal fourth part thereof to my son, John Kessler, his heirs, execu-
[*116] tors, and administrators. *One other equal fourth part thereof to my said daughter, Rachel Carboret Du Plaine, her heirs, executors, and administrators; one other equal fourth part thereof to my said daughter Elizabeth

Leclerc, her heirs, executors, and administrators; and the remaining equal fourth part thereof, I give and bequeath unto my said son John Kessler, his heirs, executors, and administrators in trust, that he or they do and shall appropriate, apply and dispose of the same in such way and manner, and for such uses, intents, and purposes as my daughter Hannah, notwithstanding her coverture, by any writing under her hand, attested by two or more subscribing witnesses shall or may direct, limit, or appoint, and to and for no other use, intent, or purpose whatsoever. And I do hereby nominate and appoint my said son John Kessler, executor of this my last will and testament.

"Lastly, I do hereby revoke all wills and testaments by me at any time heretofore made and published; and declare this only to be and contain my last will and testament."

At the time of the execution of this will, the testatrix had living four children; Hannah, one of them, intermarried with Thomas Schieffelin, and died on the 24th January, 1822, intestate, without making a will or other writing in the nature of an appointment directing the appropriation of the estate devised by Mary Kessler; and at her death left a husband and seven children, of whom the plaintiff is one, all of which children are living.

The testatrix, Mary Kessler, died the 24th November, 1825; and Thomas Schieffelin, the husband of Hannah and father of the plaintiff, died since the institution of this suit.

Previous to the institution of the suit the plaintiff demanded of the defendant the plaintiff's share or seventh part of the estate devised to defendant in trust, and offered a refunding bond agreeably to the directions of the act of assembly.

The case was submitted without argument.

KENNEDY, J., delivered the opinion of the court as follows:

The first question which presents itself is, what interest would Hannah, the daughter of the testatrix, have taken under the will had she survived the testatrix.

The bequest, giving rise to this question, is in the following words: "And the remaining equal fourth part thereof (mean-

ing the residue of her estate) I give and bequeath unto my said son John Kessler, his heirs, executors, and administrators, in trust that he or they do and shall appropriate, apply, and dispose of the same in such way and manner and for such uses, intents, and purposes as my said daughter Hannah, notwithstanding her coverture, by writing under her hand, attested by two or more subscribing witnesses, shall or may direct, limit, or appoint, and to and for no other use, intent, or [*117] *purpose whatsoever." In wills no precise form of words is necessary in order to pass either real or personal estate; it is sufficient if the words used indicate and convey distinctly the will and intention of the testator in regard to the disposition which he wishes to have made of his estate after his death. Hence a devise in these words, "I give my land to J. S. to give, sell, or do therewith at his pleasure," will pass a fee to the devisee in the land. Shep. Touch. 439; Co. Lit. 9, b. In Jenner and Hardies, 1 Leon. 283, where lands were devised to one Edith for life, with remainder over to A. in tail, and if A. died without issue of his body in the life of Edith, that then the land should remain to the said Edith to dispose thereof at her pleasure; and upon A.'s dying without issue during the life of Edith, it was ruled that Edith under the last clause took an estate in fee. So in 3 Leon. 71, prior to this last case, where A. seized of lands in fee devised them to his wife for her life, and after her decease, she to give them to whom she will, it was agreed by all the court that if an estate for life had not been expressly limited to the wife, she would have taken the fee under the latter clause. And in Pearson *v.* Otway, 2 Wils. 6, under a devise of land to one for life and after to her issue, but if she should have no issue, then to have power to dispose thereof at her will and pleasure, it was said by the court, that had she had no issue afterwards, she would have taken a fee. In Robinson *v.* Dusgale, 2 Vern. 181, A. devised his land to B. in fee, paying four hundred pounds, whereof two hundred pounds to be at the disposal of his wife by her will to whom she should think fit to give the same. The wife died intestate, and the two hundred pounds were held to be an absolute vested legacy in the wife, and that

her administrator was entitled to recover it. And in Tomlinson *v.* Dighton, 1 P. Wms. 171, Parker, Chief Justice, lays down the distinction between a power given with a particular description and limitation of the estate (as in that case for life) and where generally; that in the former case, the power is a distinct gift and comes in by way of addition, but in the latter, the whole right of property, as it is to be disposed of, must be considered to be vested in those who are to dispose of it: and accordingly in Maskelyne *v.* Maskelyne, Amb. 750, a bequest of three hundred pounds to A. to dispose of by will was held to vest an absolute interest in A. and to entitle him to the three hundred pounds. So in a late case, Hixion *v.* Oliver, 13 Ves. 108, a bequest being made in the following terms, "To my dearly beloved wife the sum of three hundred pounds to be disposed of as she thinks proper, to be paid after her death," it was adjudged to be an absolute vested legacy, and she having died without disposing of it, that her administrator was entitled to receive it. It seems to me to be impossible to distinguish these cases in principle from the one under consideration. The circumstances of the bequest being given to the plaintiff in error in trust, cannot alter the character of it in the least, as regards its being an absolute vested legacy, *because it is given to him expressly for the use of Hannah [*118] without any limitation as to interest, but accompanied by an absolute power given to her without the control of any one to dispose of it to whomsoever she pleased. The plaintiff in error was interposed as a trustee merely on account of the coverture of Hannah, and for the purpose of giving to her full and absolute power over the subject of the bequest, free from all interference and control on the part of her husband: in short, to make her as completely the owner of it and to place it as much at her disposal as if she had been a *feme sole.*

Independent however of all these authorities showing it to be an absolute and vested interest, I think it perfectly clear from the tenor of the will that the testatrix intended it to be so. It is manifest that she did not mean to die intestate as to any part of her estate, and if she had not given the fourth of the residue thereof in question to Hannah, she has certainly given

it to no other by her will. And again in the immediately preceding clauses disposing of the other three-fourths of the residuum among her other three children, it is clear beyond the possibility of doubt, that she has given a fourth thereof to each of them absolutely, and then comes the clause containing the bequest in question, which is general too, and without any restriction or limitation whatever of the interest intended to be given; so that taking the whole together, I cannot conceive how it is possible for any one to doubt that she intended to distribute her estate equally among her four children, and to give to each the full and absolute benefit of his or her equal proportion of it.

Having now shown, not only from authority but likewise from the intention of the testatrix as manifested by the will itself, that the legacy in question would have vested absolutely in Hannah upon the death of the testatrix, had she survived, the next question presenting itself is, did the legacy lapse by the death of Hannah during the lifetime of the testatrix, or has the lapse of it been prevented by the operation of the act of assembly of the 19th of March, 1810. Purd. Dig. 566. By this act it is declared, that "no devise or legacy in favour of a child or other lineal descendant of any testator, shall be deemed or held to lapse or become void by reason of the decease of such devisee or legatee in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator; but such devise or legacy shall be good and available in favour of such surviving issue." Now Hannah, the legatee, being the child of the testatrix, and having left issue four children, of whom the plaintiff below is one, that survived the testatrix, brings this case expressly within the provision of the act, and gives the issue or children a title to the bequest. The only remaining question that possibly could be raised is, whether the legacy upon the death of the testatrix was transmitted by law to the issue of Hannah jointly, or to them severally to be divided and paid in equal portions. The act of assembly referred to contains no specific direction on this point; but I see no good reason, why the

rule prescribed by the act of *assembly, for making distribution of intestates' estates among their lineal descendants should not be adopted: this will give to each of the children of Hannah an equal fourth part of the bequest in severalty, and exclude all ground in any event for setting up claims on the principle of the right of survivorship which is not much favoured in law. [*119]

The judgment of the court below is affirmed.

Cited by Counsel, 12 Wr. 503; 10 S. 513; 17 S. 550; 7 O. 170.

[Philadelphia, February 9, 1835.]

Spicer *qui tam against* Rees.

CERTIORARI.

A certiorari does not lie to the Supreme Court from the decision of the Mayor of the city of Philadelphia, in an action brought to recover the penalty for a breach of the ordinance passed March 28th, 1822, relating to stalls in the market.

Certiorari to John Swift, Esq., Mayor of the city of Philadelphia

This was an action of debt, to recover the penalty of five dollars, for an alleged violation of the first section of an ordinance of the city, passed the 28th of March, 1822, and entitled "A further supplement to an ordinance for the regulation of the market held in High street, and for other purposes."

The third section is as follows:

"From and after the passing of this ordinance, no stall or stand in the western moieties of either of the market-houses in High street, west of Fourth street, shall be let to any person exercising the trade or occupation of butcher or victualler, for the purpose of exposing for sale any beef. And if any person as aforesaid, occupying a stall or stand as aforesaid, shall vend or expose for sale, in any or either of the western moieties aforesaid, any beef, he, she, or they shall forthwith forfeit all right to the stall or stand so occupied, and shall also forfeit

and pay the sum of five dollars, to be recovered with costs before the mayor, recorder, or any alderman; one-half thereof for the use of the person suing for the same, and the other half for the use of the city."

Upon the hearing the following facts were given in evidence:

That the defendant, Jacob Rees, was the servant of John Serrill, of the county of Delaware, in this commonwealth, and as such, did, before the issuing of the process in this case, use [*120] and occupy a stand, *stall, or place within the western moiety of the market-house in High street, between Delaware Seventh and Eighth streets, and there expose for sale and vend, beef: That the said John Serrill was the owner of the beef so exposed for sale and sold, and was the legal renter of the stand, stall, or place upon which it was exposed for sale and sold.

That the said John Serrill was, at the time aforesaid, and for a long time before, and still is, an extensive farmer and grazier, residing in the county of Delaware aforesaid: That he is the occupier of three hundred and four acres of marsh or meadow land in the counties of Philadelphia and Delaware, and of one hundred and six acres of upland in said Delaware county; and besides beef, sends to market and exposes for sale upon the stand, stall, or place aforesaid, butter, poultry, vegetables, and other articles, the produce of his farm.

That the beef exposed for sale and sold as aforesaid, was fattened upon the farm of the said John Serrill, in the usual course of grazing in the district of country where he resides; the cattle having been purchased, in a lean state, from eastern and western drovers, in the early part of the season, and pastured upon the farm of the said John Serrill, until they were fattened, when they were slaughtered, and exposed for sale, upon the stand, stall, or place aforesaid, by the said defendant, as the servant of the said John Serrill.

Upon these facts the mayor rendered judgment for the plaintiff.

Exceptions.—1. The mayor of the city of Philadelphia had no authority to hear and determine the complaint.

2. The said mayor erred in deciding that the defendant was a person exercising the trade or occupation of butcher or victualler within the meaning of the ordinance under which the penalty was claimed, and the act of assembly of the 19th of March, 1810, authorizing the city to extend the market-house in High street.

3. The said mayor erred in deciding that the beef exposed for sale and sold by the defendant, was not the produce of the farm of John Serrill within the meaning of the said act of assembly and the ordinances founded thereon.

4. Upon the evidence before the mayor, judgment should have been rendered for the defendant.

The act of assembly referred to in the second and third exceptions—5 Smith's Laws, 118, is as follows:

"SECT. I. It shall and may be lawful for the corporation of the city of Philadelphia, when, and as often as they shall think proper, to extend the market-house in High street, or elsewhere in the said city, to build a market-house or houses, to let or demise the one-half of the stalls which they may erect, to such persons from the country, as send or carry the produce of their farms to the said *market, and to no others, and to let the other half of the stalls so erected at their own discretion to such person or persons, butchers or victuallers, as to them it may seem proper; any law, usage, or custom to the contrary notwithstanding. [*121]

"SECT. II. Whenever the market-houses in High street shall be extended, it shall not be lawful for any victualler to sell any beef in the western moiety of any market-house or shambles that may be erected at any time hereafter in High street; but the western moiety shall be let to such persons from the country, who send or carry the produce of their farms to market, and to no others, and the one-half of the stalls that may be erected elsewhere, shall also be let to such persons from the country, who send or carry the produce of their farms to market, and to no others; provided, that the annual rent so to be charged and received, shall not exceed twenty dollars per stall."

Olmsted, *J. C. Biddle*, and *W. M. Meredith*, for the plaintiff.

Wm. T. Smith and *Chauncey*, for the defendant.

Mr. Smith having commenced his argument in support of the exceptions, a doubt was suggested by the court, whether their right to issue a *certiorari* to the mayor was not taken away, by the 24th section of the act of March 20, 1810. The argument upon the exceptions was then suspended, and the counsel was requested by the court to argue the question of jurisdiction.

The counsel on both sides, agreeing as to the right of the court to issue the *certiorari* in this case, the question was argued by *Olmsted* and *Smith*, who contended,—

1. That the action before the mayor was a strictly popular one, not intended to compensate the plaintiff for any injury suffered by him, but to punish the defendant, and therefore not a civil action within the act of March 20, 1810, taking away the writ of *certiorari*. Buckwalter *v.* The United States, 11 Serg. & Rawle, 193; Zeigler *v.* Gram, 13 Serg. & Rawle, 102; Davy *v.* Baker, 4 Burr. 2471. A writ of *certiorari* may issue from this court to remove the proceedings of a justice under the act of 1705, relative to swine running at large. Commonwealth *v.* Fourteen Hogs, 10 Serg. & Rawle, 393.

2. The right of this court to issue a *certiorari* to the mayor, even in civil actions, has never been taken away.

The act of March 20, 1810, refers only to justices of the peace. Justices of the peace, are a class of officers, whose appointment is provided for in section 10, of art. 5, of the constitution. A mayor is a magistrate of an entirely distinct class, deriving his appointment from a different source, and exercising different functions.

If the mayor is a justice of the peace, he is entitled to the civil jurisdiction conferred upon the latter officer, by the act of March 20, 1810, which has never been pretended. If he is [*122] included in *the term, "justice of the peace," in the 24th section of the act he must be included in the same term in the other sections.

It can make no difference that the mayor has, to some extent, the powers of a justice—his office of mayor is not merged. The judges of the Common Pleas are, by the constitution, justices of the peace. Does the act of 1810, therefore, take away the *certiorari* to them?

The act of 1810 takes away from parties to civil actions before a justice of the peace, the protection of this court, and therefore ought to be, and always has been strictly construed. In Lenox *v.* M'Call, 3 Serg. & Rawle, 101, it was held that a *certiorari* lay to the proceedings of two aldermen under the act of April 6, 1802. A similar construction was applied in Clark *v.* Yeat, 4 Binn. 185.

If this court cannot issue a *certiorari* to the mayor, parties injured by his judgments will be without remedy.

By section 8, of art. 5, of the constitution, the judges of the courts of Common Pleas have power to issue writs of *certiorari* to justices of the peace. They have no authority under the constitution, or under any act of assembly, to issue a writ of *certiorari* to the mayor.

This court has ample power. Judiciary act of May 22, 1722. Commonwealth *v.* Beaumont, 4 Rawle, 366.

The opinion of the court was delivered by

Gibson, C. J.—By the twenty-fourth section of the act of 1810, it is declared that "no writ of *certiorari* by or out of the Supreme Court to any justice of the peace in any civil suit or action, shall be available to remove the proceedings had before such justice." Is the present then a civil suit? Whatever may have been the notions of the courts in the earlier times, the point was solemnly considered and decided in Atcheson *v.* Everitt, Cowp. 382, where it was determined that actions strictly popular and not compensatory, are not criminal prosecutions, but civil suits. The question was, whether in an action of debt on the 2 G. 2, c. 24, section 7, which gives a penalty for bribery to any one who will sue for it, the testimony of a Quaker family might be received on his solemn affirmation pursuant to the 8 and 9 W. 3, which authorizes such testimony, except in "any criminal cause," and the 22 G. 2, c. 30, which

prohibits it in "any criminal case;" and it was adjudged competent, though the action was not only popular but productive of personal disabilities. In delivering the opinion of the court, Lord Mansfield remarked that penal actions had never been ranked with criminal prosecutions by elementary writers; and that such a proceeding was as much a civil action as if it were for money had and received. In this he is certainly corroborated by Wynn *v.* Middleton, 1 Wils. 125, in which it was held that an action for double damages as a penalty for a false return, given by the 7 and 8 W. 3, c. 7, to the party aggrieved, is not a criminal prosecution, but a civil action, and amendable, as such, by the 16 and 17 Car. 2, c. 8, though the 4 G. 2, c. 26, excepts *criminal cases from the operation of the statutes of jeofails; and the judgment was affirmed in the Exchequer Chamber. It must be admitted, however, that the damages beyond mere compensation, were given to the party injured; but Lord Mansfield recognized no distinction on that head. Such is the law as settled on principle and the latest authority in England. But as standing in opposition to it, is cited the decision in Buckwalter *v.* The United States, 11 Serg. & Rawle, 193, in which it was said generally by Mr. Justice Duncan, delivering the opinion of the court, that an action of debt on a penal statute, is not within the compulsory arbitration act which is applicable in its terms but to civil suits. The action there, however, was brought by a sovereign for an infraction of the laws of the land, and not, as here, for the infraction of the by-law of a corporation; and though it has been determined that the United States, when descending to the level of an ordinary suitor in a state court, divests herself of the prerogative of a sovereign, yet it may well be thought that her action for a breach of the criminal laws is not a civil suit within the intent and meaning of the arbitration act, which has, in other instances, been construed more restrictively than the letter would seem to require; as in Jones *v.* Stratton, 4 Serg. & Rawle, 76, and Deal *v.* Deal, 7 Serg. & Rawle, 201, where it seems to have been thought that account render, though indisputably a civil action, was not originally within its purview; and in Roop *v.* Meek, 6 Serg. &

[*123]

Rawle, 345, the same thing seems to have been thought of an action on a bail bond or a recognizance in a criminal prosecution, the court having a discretionary power to stay proceedings, or to remit or moderate the penalty. In Buckwalter *v.* The United States, policy required that the accused should not be suffered to baffle the prosecution by arbitrating the question of criminality with his prosecutor; and that was in truth the ground of the decision, though Mr. Justice Duncan, as was his custom, brought to the defence of his position every technical principle and authority that could be brought to bear upon the argument. He was perhaps inaccurate in saying that statutes of amendment do not extend to penal actions except perhaps where the state is prosecutor. Here, however, the state is not a party, as the plaintiff prosecutes for himself and a corporation.

It is contended, however, that though the action be a civil one, the writ of *certiorari* may well lie from this court to the mayor who is not a justice of the peace, and whose proceedings, therefore, are not within the prohibitory clause. But he is clothed with no other jurisdiction than that of an alderman who is virtually a justice, and whose proceedings can be dealt with by the courts of record only as such. The root of the matter is, that the mayor had no jurisdiction of the cause of action by the general law giving civil jurisdiction to justices and aldermen; and the legislative power of the corporation was incompetent to supply the deficiency, as was determined in Baxter *v.* The Commonwealth, 3 Penn. Rep. 260. *The judgment being void, there needs no reversal. How- [*124] ever worthy of decision by the court in the last resort, it seems impossible to get at the question in the present shape. The end might perhaps be attained by an indictment in the Mayor's Court; and though it may not be inconvenient if not oppressive in practice to prosecute every breach of an ordinance in that way, an application to the legislature would doubtless produce an appropriate remedy, saving to the accused his constitutional right to a trial by jury on appeal. We are, however, to administer the law as we find it; and we feel ourselves not at liberty to disregard the injunction

[Spicer *v.* Rees.]

which forbids us to take jurisdiction of the question by *certiorari*.

Writ quashed.

HUSTON, J., was absent.

Cited by Counsel, 6 N. 90, s. c. 6 W. N. C. 2.
Discussed and distinguished, 26 S 469, 470.
See Frick *v.* Patton, 2 R. 20.

[PHILADELPHIA, FEBRUARY 9, 1835.]

Donahue *against* Dougherty.

IN ERROR.

In an action against a clergyman to recover the penalty for marrying a minor without consent of his parent, under the act of 1729, the plaintiff filed a statement to which the defendant demurred: and afterwards a declaration in debt, which he was allowed by the court to substitute for his statement, and judgment of *respondeat ouster* was entered on the demurrer.

Held, that the statement being unauthorized by the act of assembly was a nullity, and the plaintiff might declare as though no legal specification of the cause of action had been made, and the judgment of *respondeat ouster*, though unnecessary, did not vitiate the subsequent proceedings. Nor was the verdict bad as being founded in part on the defective statement, which was a mere nonentity and entirely superseded by the declaration.

A judgment after a trial, on the merits, is not to be treated as erroneous because there was no plea.

A writ in debt is within the remedy prescribed by the act of 1729, by "bill, plaint, or information."

The grievance, to entitle the plaintiff to recover, is not necessarily an actual and specific damage; it is sufficient that the marriage is an unjustifiable interference with the relation existing between the parent and his offspring, and in that aspect, a grievance in contemplation of law. Per GIBSON, C. J.

It is no defence that the clergyman misconceived the age of the person married.

The District Court for the city and county of Philadelphia has jurisdiction of this action; it being a civil remedy for a private injury.

ERROR to the District Court for the city and county of *Philadelphia*.

This was debt brought by Dougherty against the Reverend T. J. Donahue to recover the penalty of fifty pounds for mar-

rying his *infant son without his consent. On the 28th April, 1831, the plaintiff filed the following statement of his claim. [*125]

"The defendant is a clergyman, and on the 13th day of February, 1831, at the city of Philadelphia, united in matrimony and joined in marriage Thomas B. Dougherty, a son of the plaintiff, under the age of twenty-one years, with Ann M'Callister, without the knowledge or consent of the said plaintiff.

"For this wrong the plaintiff claims damages in the sum of fifty pounds, according to the provisions of the act of assembly in such case made and provided."

On the 8th of June, 1831, the defendant filed a general and special demurrer to this statement.

The plaintiff afterwards, on the 12th of July, 1831, filed a declaration in debt, and entered a rule on the defendant to plead.

On the 4th March, 1832, the defendant pleaded "not guilty with leave."

On the 10th March, 1832, the court below allowed the plaintiff to amend by substituting his declaration, filed 12th July, 1831, for the statement, and the plaintiff having joined in demurrer, judgment of *respondeat ouster* was entered, and a rule granted on the defendant to plead in six days.

Afterwards, on the 26th October, 1832, the cause came on to be tried, and a verdict was found for the plaintiff, for one hundred and thirty-three dollars and thirty-three cents.

On the trial, the plaintiff gave in evidence the testimony of three witnesses, Rosanna Pollock, Samuel M'Collin, and Mary Toole: the first of whom testified that she knew that the plaintiff's son Thomas was born on the night on which the news of peace between this country and Great Britain arrived, to wit, on the 15th of February, in the year 1815. That he was about sixteen years of age when joined in marriage by the defendant. M'Collin testified that the plaintiff's son was joined in marriage to a young lady by the defendant in February, 1831, about seven o'clock in the evening, at the apartment or room of defendant; that there were a candle and a fire burning in the

room; that the plaintiff's son was wrapped in a large cloak, and was about five feet ten inches in height; that the witness should have judged him to have been then upwards of twenty-one years of age; that he told the witness that the plaintiff's son was twenty-one years of age; that the clergyman (the defendant) did not inquire his age, and that the defendant did not ask nor receive any pay or fee for performing the ceremony, that he saw or knew of. Mary Toole, the third and last witness examined by the plaintiff, testified, that she was present when the defendant joined in marriage the plaintiff's son to Ann M'Callister; that the defendant asked him no questions as to his age; that according to the witness's judgment, the plaintiff's son was twenty-one or twenty-two years old, and that he alleged he was of such age.

[*126] *The counsel for the defendant requested the judge to charge the jury, that the plaintiff, to sustain this action against the defendant, should prove, first, that the plaintiff was grieved by this act of the defendant in joining his son in marriage; secondly, that if the defendant had good reasons to believe from the appearance of the son, or if the jury believed that the defendant honestly thought that he was twenty-one years of age, then the plaintiff could not recover; thirdly, that there was not sufficient evidence of the birth of the plaintiff's son, or of his minority at the time of the marriage, produced or given by the plaintiff to the jury; fourthly, that an infringement of the act of assembly in such case was an offence, the penalty for which was to be recovered by bill, plaint, or information, by the person or persons who could show that he, she, or they was or were grieved, and that the clergyman had not made such publication as was required by the said act of assembly, and that the penalty could not be recovered in a civil action of debt for fifty pounds.

The judge charged the jury that,

The plaintiff need not make such proof of grievance or of tuition.

That the plaintiff could recover even if the defendant were mistaken, for he married them at his peril.

That the jury must judge for themselves as a matter of fact

whether the testimony was sufficient to prove the birth and minority of the plaintiff's son, and—

That the plaintiff could recover in the form of action (of debt for fifty pounds) which he had adopted.

The defendant excepted to this opinion of the court, and assigned for error as follows:

1st. The court below erred in overruling the general and special demurrers to the statement filed by the plaintiff below, and in entering judgment of *respondeat ouster* against the defendant below.

2d. The court below erred in allowing the plaintiff below to amend by substituting for his statement the declaration filed on the 12th of July, 1831, because,

First. Being a penal action, no amendment was allowable therein. *Secondly.* Because the declaration sets forth a new and different cause of action from that set forth in the statement.

3d. There is error in this, that the writ and declaration are in debt, whereas the act of assembly prescribes the remedy to be by bill, plaint, or information.

4th. The court below erred in charging the jury:

First. That the plaintiff below need not make proof of grievance by him suffered, by reason of his son's marriage nor of tuition *in or by him, of such son. *Secondly.* That the plaintiff below could recover in this action, [*127] although the defendant had been honestly mistaken as to the age of the minor; and that he married the parties at his risk. *Thirdly.* That the plaintiff below could recover in the form of action pursued by him.

5th. The verdict being general upon both declarations, and the first being defective and bad, the judgment cannot be supported.

6th. The plaintiff's statement being for a "wrong," claiming damages in the sum of fifty pounds, the plea filed on the 4th March, 1832, by the defendant, follows the statement, and is "not guilty." But the court below having allowed the plaintiff, on the 10th of March, 1832, to substitute the narr. in debt, previously filed, and granted a rule to plead in six

days, no plea was pleaded to the substituted narr., consequently, there being no issue, the judgment cannot be supported.

Troubat and *Haly* for the plaintiff in error argued:

1. The objection which first occurs to the judgment and proceedings here, is, that not only the act of assembly on which the action is founded, is antiquated and unadapted to our present condition, (however salutary it might have been a century ago,) but it is utterly incongruous to impose a penalty under it on a clergyman or justice, for going through a ceremonial which this court have declared to be superfluous, and which might be performed as effectively without as with their interference. Marriage, however sacred as a religious rite, is, according to the law of Pennsylvania, but a civil contract which may be completed by any words in the present time, without regard to form. Hantz *v.* Seely, 6 Binn. 405. This decision nullifies the act of assembly in question, and declares the aid of either the ecclesiastic or judicial functionary superfluous. Where minors thus marry, the contract is either void, voidable, or perfect. If perfect, then the clergyman or magistrate is useless, except as a mere witness; and it is manifestly incongruous to inflict a penalty for doing an act which superadds no mischief or injury which would not have occurred without their ministry.

The first section of the old act (1700) speaks of twelve witnesses, (one being a justice,) and imposes a fine of twenty pounds on the person marrying, five pounds on each witness, and the payment of damages to the party grieved. The latter may proceed for damages if he decline suing for the penalty. (Per Tilghman, C. J., 14 Serg. & Rawle, 289.)

The second section of the act of 1729–30, speaks thus: "If any justice of the peace, clergyman, minister, or other person shall take upon him to join in marriage, &c., or if any justice of the peace shall be present at and subscribe his name as a witness to any marriage," &c. Now, since the decision above cited, the contract derives no validity from the presence of a clergyman or justice, and the provision *is therefore [*128] nugatory. Besides, the law itself is absurd, inasmuch

as by its terms, a clergyman is liable for marrying "any person," whether a minor or adult, without publication.

2. The District Court had no jurisdiction of this action.

By the act of March, 1811, section 1, 2, constituting that court, it is invested with jurisdiction of "all civil pleas and actions, real, personal, and mixed," and the jurisdiction of the Common Pleas in all civil actions when the sum in controversy shall exceed one hundred dollars is determined.

If this be not a civil plea or action, then there is no jurisdiction.

Throughout the act of 1729–30, the act here alleged to have been performed by the plaintiff in error, is characterized as an offence. The decisions upon it speak of it as such, and declare that the object of the law was not so much to compensate for the injury, as to deter all persons from being accessory to clandestine marriages. For this purpose a certain penalty was thought to be the best remedy. 14 Serg. & Rawle, 288, 289. The court there treated it as a penal law, and subject to a strict construction.

The District Court has no jurisdiction of forfeited recognizances. Wharton's Dig. 158, pl. 181; Schaffer *v.* M'Namee, 13 Serg. & Rawle, 44, will apply to show want of jurisdiction. It was an action of debt against a sheriff before a justice for an escape, and was not sustained because it was for "a penalty for official misfeasance." See Zeigler *v.* Gram, Ib. 102; Davy *v.* Baker, 4 Burr. 2471. Debt on the statute against bribery is called a criminal charge. The cases that decide the question of the right to arbitrate, determine this. Whart. Dig. 39; Roop *v.* Meek, 6 Serg. & Rawle, 542; Buckwalter *v.* United States, 11 Serg. & Rawle, 193. So as to removal of causes. Whart. Dig. 148, 149, pl. 66, 67; 2 Yeates, 352.

Nor do the words in the act designating the remedies by "bill, plaint, or information," aid the jurisdiction, but the contrary. The two latter are not adapted for that court. "Bill" means bill of Middlesex. At the time of the act imposing this penalty, the act of 1724–25, "to regulate the practice upon writs of summons and arrest," had been in force several years, and the proceedings for this penalty would have been accom-

modated to that practice, had the legislature intended them to partake of the nature and incidents of civil actions or pleas. It is therefore clear that this statute, if to be enforced at all, can only be enforced now in the courts wherein they could be enforced when the act was passed.

3. The court erred in overruling the demurrer and allowing the plaintiff below to amend by substituting a declaration for a statement.

1st. Because being a penal action, it was not within the act of 1806, regulating amendments. Buckwalter *v.* United States, 11 Serg. & Rawle, 193.

2d. Because the substituted declaration sets forth a new and [*129] different *cause of action. The act was not intended for such cases. 5 Binn. 53; 2 Serg. & Rawle, 1; Diehl *v.* M'Glue, 2 Rawle, 337.

Here the statement obviously sets forth no cause of action whatever, as is apparent by the demurrer which exhibits its entire insufficiency in substance and form. If it contains no cause of action whatever, then if the substituted paper contains any cause of action, in the words of the decision, it must set forth a new one, and is therefore inadmissible.

4. The fifth and sixth errors assigned were not waived below, by pleading and going to trial, because these acts were involuntarily and under compulsory rules for those purposes, as appears by the record. Free from this objection the errors are sustained by long settled and innumerable decisions.

Brewster, for the defendant in error, having cited Norris *v.* Pilmore, 1 Yeates, 408, was stopped by the court, whose opinion was delivered by

Gibson, C. J.—A statement in an action like the present, being unauthorized by the act of assembly, is a nullity; consequently the court could not prevent the plaintiff from declaring as he might have done originally, and as if no attempt at legal specification of the cause of action had been made. This not only relieves us from a consideration of the questions of amendment, but disposes also of the de-

murrer to the statement; for though the judgment of *respondeat ouster* was unnecessary, it did not vitiate the subsequent proceedings. Nor is the verdict bad as being founded in part on the defective statement which was entirely superseded by the declaration, or if permitted to remain on the record, was a legal nonentity. The original plea of not guilty, which, when pleaded to an action of debt, is equivalent to what was formerly called a horse plea, might have been disregarded and the party ruled to plead as at first; which however was not done. But conceding it to be a nullity as it certainly was, it does not follow that the judgment after a trial on the merits, is to be treated as erroneous for the want of a plea, which was held to be cured by the verdict in Sauerman *v.* Weckerly, 17 Serg. & Rawle, 116. Nor is the allegation of variance between the writ in debt and the prescribed remedy "by bill, plaint, or information," better founded, the first and second of these terms, according to the English practice from which they are borrowed, indicating a remedy by action without specifying its form.

The objections to the charge are equally groundless. The penalty is given to the "person or persons grieved;" but the grievance to be redressed is necessarily an actual and a specific damage, it being sufficient that the marriage is an unjustifiable interference with the relation existing between the parent and his offspring, and, in that aspect, a grievance in contemplation of law. To say nothing of education and nurture superseded by the obtrusion of a *new relation into the family, the deprivation of the right gone by forever, to participate [*130] by counsel and advice in the formation of a connection involving the happiness or misery of a child, may be numbered with the severest injuries that can be inflicted on a parent. Neither could the defendant insist on his own misconception of the son's age. The law has furnished a guide for doubtful cases by which a minister or magistrate may proceed securely; and when he forsakes it for the guidance of his senses, he proceeds at his peril. Nothing but compliance with the injunctions of the statute, or fraudulent representations by the parent producing a departure from it, can protect him.

The exception to the jurisdiction is founded on the act creating the District Court, which gives it power to hear and determine "all civil pleas and actions;" and it is affirmed that an action for a penalty such as this, is not a civil plea, but a criminal prosecution. It is however clearly within the letter of the second section, which directs "all suits and causes" depending in the Common Pleas, to be transferred to this court, and which therefore qualifies the sense of the word "civil" wherever it occurs in the act. Now it is impossible to believe that the present is not only a suit but an action; and it is clearly within one of the terms used by the legislature who contemplated without regard to technical subtleties, the removal of all causes which presented the appearance of a private claim prosecuted on the civil side of the court. But whatever may be the character of an action purely popular, yet where a penalty is given, as in this case, to the party injured, an action for it cannot be considered as a prosecution for a public wrong, but as a civil remedy for a private injury; and so it was held in Norris *v.* Pilmore, 1 Yeates, 408, cited by the counsel for the defendant in error. The authority of that case is unquestionable and conclusive; so that the exception to the jurisdiction is not sustained.

Judgment affirmed.

Cited by Counsel, 2 Wh. 347; 1 Barr, 431; 1 H. 174.
Cited by the Court, 8 W. 242.
Approved in, 5 R. 212.

[*131] *[PHILADELPHIA, FEBRUARY 9, 1835.]

Waters *against* Largy.

APPEAL.

A. being about to borrow money of B. on mortgage through the agency of C. a money broker, it appeared by the certificates that a judgment was outstanding against him. C. produced to him the receipt of the judgment creditor for the amount of the judgment; upon which B. lent the money.—Afterwards A. being in want of more money applied to D. for a loan; and to satisfy him

that the property was clear of incumbrances obtained from B. the certificate, together with the receipt of the judgment creditor; upon which D. made the loan. In the meantime C. had procured the judgment creditor to mark the said judgment to his use, and it so appeared on the certificates of judgment obtained by D. Held, that the lien of this judgment was extinguished by the payment of the money and could not be revived by the marking to the use of C. and under the circumstances, that D. was entitled to payment in preference to C.

THIS was an appeal from the decision of the District Court for the city and county of *Philadelphia*, on the report of the auditor appointed to make distribution of the moneys arising from the sale of the defendant's real estate, at the suit of the plaintiff, Charles Waters.

The court decided that a judgment for one hundred and three dollars and thirty-nine cents in favour of A. D. Cash, was entitled to priority over a judgment for the plaintiff.

The plaintiff appealed, and assigned for reasons that the court erred in preferring Cash's judgment, that having ceased to be a lien on defendant's estate at the time of the distribution, and because even if Cash's judgment was a lien at law, yet it must be postponed to the plaintiff's; Cash having represented in fact that his judgment had been paid and satisfied.

The material facts of the case are as follows. About the 25th January, 1833, Peterson having a sum of money to invest, applied to Cash, a conveyancer and money broker, to procure a real security. Cash mentioned a Mr. Largy as wanting the money on a house on Logan street, to be clear of all incumbrances, to which Peterson consented. Cash directed searches for incumbrances, and in presenting the certificates of judgment to Mr. Peterson, the latter noticing an unsatisfied judgment against Largy in favour of John Goddard for ninety-four dollars and twenty-five cents, objected to making the loan till that was paid. In a day or two afterwards Cash handed Peterson, Goddard's receipt, dated 9th February, 1833, for ninety-four dollars and twenty-five cents, as received from Cash for the amount of the judgment against Largy, the cost and interest still remaining unpaid. Peterson

[*132] thereupon advanced the money, *noticing at the same time that the costs and interest had not been paid on Goddard's judgment. Cash observed that he would see that all right before he parted with the money. Some time afterwards he paid the costs and interest and had the payment noted on the receipt.

About seven or eight months afterwards, Largy called on Peterson and asked him to lend him the searches which had been left with him at the time of the loan through Mr. Cash; his object being to obtain an additional loan on the property. Largy obtained the searches to which was attached Mr. Goddard's receipt. On the evidence of this receipt, Waters, the plaintiff, loaned Largy two thousand dollars on the security of a judgment without retaining the ninety-four dollars and twenty-five cents, considering it to have been paid previously to Mr. Peterson's advance.

On the 8th March, 1833, (between the periods of the loans by Peterson and Waters,) Cash procured an order from Mr. Goddard's attorney to have the said judgment marked to his use, which was accordingly done on the docket of the Common Pleas on the 13th of August following: and it so appeared marked to his use on the certificates of judgments obtained by Waters before loaning his money. The amount of the judgment was paid by a young man on behalf of Cash to Goddard, who testified that he could not recollect any stipulation or condition at the time of payment or before, relative to a transfer of the judgment, but that he met Cash in the street, who then stated that the judgment was to be transferred to him.

The case was argued by *Grimshaw* for the plaintiff in error; and by

Campbell for Cash.

The opinion of the court was delivered by

KENNEDY, J.—If the judgment against Largy in favour of Goddard was paid by Cash for the purpose of extinguishing the lien of it upon the real estate of Largy it could not be revived afterwards by Goddard's attorney directing the judg-

ment to be marked on the docket for Cash's use. Now from the evidence, it is utterly impossible that the most skeptical mind should doubt as to the object of paying this judgment. It was a lien upon the real estate of Largy, when Peterson was applied to, to lend his money upon a mortgage to be given upon the estate as a security for the repayment of it. But he objected to lending, unless this lien were removed, and in order to effect this, Cash paid Mr. Goddard the principal of the judgment, and at the time of receiving the money on loan from Peterson for Largy, he promised that before he parted with it he would have the interest and cost of the judgment settled likewise; for which purpose the receipt given by Mr. Goddard for the *principal of the judgment was left by Mr. Peterson with Mr. Cash that he might procure [*133] a receipt on the same for the interest and costs. Accordingly the receipt was afterwards returned to Mr. Peterson with an entry on it of the interest and costs having been paid. Under what arrangement Cash advanced the principal of the judgment for Largy does not distinctly appear, but certain it is that it could not have been under an agreement that he was to have the judgment assigned to him as a security for his being reimbursed, because a continuance of the judgment in force would have been incompatible with the end of advancing the money, which was to have the lien of it extinguished. Hence it is not material to know how Mr. Cash expected to be reimbursed. But no doubt if he had wished, he could have had it out of the money loaned by Peterson, as that all passed through his hands. Be that however as it may, it is certain that the judgment was paid for the special purpose of extinguishing its lien. And of all this Mr. Waters seems to have been fully advised before he lent his money to Largy and took from him his judgment for the repayment of it. Largy himself prevailed on Mr. Peterson to furnish the receipt of Mr. Goddard in order to satisfy Waters that it was paid.

But it is said that the judgment of Goddard being marked on the docket for the use of Cash before and at the time Waters advanced his money and took from Largy a judgment for the repayment of it; Waters was bound to take notice of Goddard's

judgment, and to know that the amount of it was claimed by Cash. Admitting this to be so, still it will not make the claim of Mr. Cash under the judgment good and available. The judgment being once satisfied and extinguished could not possibly be revived afterwards by any act of Mr. Cash, or of Mr. Goddard or his attorney, or all or any of them without the consent of Largy the defendant. But it does not appear that his assent was ever given or even asked for such a purpose; consequently the judgment of Goddard must be considered satisfied, and could therefore be no lien on the real estate of Largy at the time Waters obtained his judgment. Waters, therefore, is entitled to the money that was appropriated by the decree of the court below to the payment of Cash's claim under Goddard's judgment. I think there is much less plausibility in the claim of Cash than there was in that of Porter's Executors *v.* Neff, 11 Serg. & Rawle, 208, where on the 1st of May, 1807, A. executed a mortgage to B. which was duly recorded. On the 14th of March, 1815, C. entered up a judgment for two thousand dollars against A. under a warrant of attorney. On the 17th of the same month, A. conveyed the mortgaged premises to D. for the consideration of twenty-eight hundred dollars, twenty-three hundred of which he paid and agreed to pay to B. the mortgagee five hundred dollars, being the balance of the purchase-money and the balance due on the mortgage; part of which he paid in his lifetime; and the residue was paid after [*134] his death by *his executors, who took an assignment of the mortgage from the mortgagee on the 23d of September, 1818. The mortgaged premises were levied on and sold by the sheriff under the judgment of C. to C. himself. Held, that C. was entitled to retain the amount of his judgment out of the purchase in preference to the claim of D.'s executors under the assignment of the mortgage.

The decree of the court below is reversed, and the money thereby appropriated to the payment of Cash's claim under the judgment in favour of Goddard against Largy, is ordered and decreed to be paid to Charles Waters the appellant.

Judgment reversed.

Cited by Counsel, 2 Barr, 96.

[PHILADELPHIA, FEBRUARY 13, 1835.]

Gest *against* Heiskill.

An offer to purchase the acquittance of a debt, barred by the statute of limitations, is an offer of compromise, which is insufficient to raise a promise to pay by implication of law.

ERROR to the District Court for the city and county of *Philadelphia.*

It was an action to recover the price of flour sold by Gest & Dickinson to Heiskill, in February, 1814.

On the 6th of June, 1814, Heiskill was discharged under the insolvent laws, by the Court of Common Pleas of Philadelphia county, and returned Gest & Dickinson for an unsettled amount as creditors.

For the plaintiff it was proved that somewhere about the latter part of the year 1813, the defendant, Heiskill, became under-contractor, under Robert M'Coy for the supply of the United States troops. That one Lewis Reineck, asked witness to see Heiskill, and ask what he would give for Reineck's old debt, due by defendant. This was four years ago. Witness went to Heiskill, and asked him if he would buy Reineck's debt. He said yes, he would buy them all if he could get them cheap. Witness told him that Reineck would take a hundred dollars for it, which defendant said he would give. Witness then asked him what he should offer Gest, the plaintiff, for the debt due him. Defendant told him to go up and see what Gest would take for it. Witness went, and Gest told him to ask defendant what *he would give. Witness [*135] went back again, and defendant spoke something about sixty dollars, and on being told by witness, that he did not think Gest would take that, he said, well, give him eighty dollars. Gest refused to take that sum. Witness told him what defendant had said previously, with respect to buying all the debts. No conversation passed between witness and defendant, as to the debts being barred by the statute of limitations. Wit-

ness went back and told defendant, and asked him if he should offer more now. Defendant said no, never mind now.

A verdict was taken for the plaintiff, for five hundred and nineteen dollars and twenty-five cents, subject to the opinion of the court, on the foregoing facts.

The court gave judgment in favour of the defendant, upon which, Gest brought this writ of error,—

It was argued by *J. R. Ingersoll* for the plaintiff in error,—

Who contended that here was an unqualified and unequivocal acknowledgment of the debt, from which the law would raise the presumption of a new promise, according to the rule laid down in Church *v.* Feterow, 2 Penn. R. 306. The qualification to preserve the bar, must contain negative words, or an express condition stipulated for at the time. The acknowledgment to take the case out of the statute may be slight, and just as well by way of recital as otherwise. A return of a debt in an insolvent's petition, will have the effect, Boyer *v.* Henderson, 6 Wheaton, 514. So a recital in a deed, King *v.* Riddle, 7 Cra. 168. In Feather's Appeal, 1 Penn. R. 322, it appears to have been considered that the statute does not run against debts due by an insolvent. The creditor cannot reasonably be presumed to have abandoned his claim when his debtor is insolvent, and having placed his liability on the records of the insolvent court, the presumption that the claim has been satisfied fails. It is well settled in Pennsylvania that a declaration of indebtedness will not avoid the statute if accompanied with a denial of liability to pay. Gallaher *v.* Milligan, 3 Penn. R. 177. But here was no such denial. If the defendant had said, tell Gest I owe him eighty dollars and no more, or if he had said, I will pay him eighty dollars and no more, it might have admitted of a question.

Mr. Ingersoll then went into a minute examination and comparison of the cases with the one at the bar, for the purpose of showing that the alleged qualification in the present case, was not such as to prevent the effect of the admission of the debt. He cited and commented on 1 Knapp. 226; 16 East, 120; 13 Johns. 288, 510; 9 Serg. & Rawle, 12; 11 Ib. 10; 12

Ib. 393; 13 Ib. 124; 3 Wash. 404; 3 Bingh. 329; 2 B. & C. 149; 1 Stark. 7; 4 M. & S. 457; 10 B. & C. 317; Cowp. 348; 2 B. & A. 760; 4 B. & A. 568; 1 Holt, 380; 1 Bingh. 266; 4 Ib. 313.

*The court declined hearing *Perkins* and *Chauncey*, who were to have argued for the defendant. [*136]

Per Curiam.—An offer to purchase the acquittance of a debt barred by the statute of limitations, is an offer of compromise which shall not prejudice him who made it. The acknowledgment of the debt implied by the offer, is insufficient to raise a promise to pay it by implication of law, because it would found an implication on an implication, which the law does not allow. Even a direct acknowledgment of the existence of the debt, does not raise such a promise, unless it be also an admission of a legal obligation to pay; for if it did, proof of the debt by other evidence than the debtor's acknowledgment, would have the same effect, and the statute, operating not on the debt, but the remedy, would be a dead letter. The remedy being barred, a new obligation would arise, as of course, from the original debt, as its consideration. Such would be the consequence of holding, that the naked existence of the debt unimpaired, as it must be admitted to be, by the effect of the statute, creates a new and independent promise. Again; where there is an express promise, there can be no implication of a promise differing from it; and here there was an express promise, but on a condition not fulfilled, which makes it no better than no promise at all; consequently the admission of the debt, being but a deduction from the express promise, follows the fate of it, of which it was but an accident. As to the position founded on a *dictum* in the decision of Feather's Appeal, 1 Penn. R. 332, that the statute of limitations does not run against the debts of an insolvent debtor, it is sufficient that no such point arose there, the question being not on the statute as a bar, but on the effect of lapse of time, as evidence of payment; nor was any such point intended to be settled, when the cause came up at consultation.

[Gest *v.* Heiskill.]

The provision in the statute that the debts of an insolvent shall nevertheless stand good against his property, was intended to express no more, than that the exemption acquired by his discharge, should extend but to his person. His subsequent earnings are to make satisfaction as if no discharge of his person had taken place. An order made with the assent of two-thirds of his creditors, that he be exempt from suit for seven years, would doubtless create an exception; but surely a naked discharge of the person from arrest which presents no obstacle to a recovery by action, would not have that effect, as it would expose the debtor to all the dangers incident to delay, by the death of witnesses and loss of papers, from which the statute was intended to protect him. The action, therefore, was clearly barred.

Judgment affirmed.

Cited by Counsel, 4 Wh. 277.
Approved in, 1 Wh. 108

[*137] *[PHILADELPHIA, FEBRUARY 13, 1835.]

Masterson and Another, Executors of Masterson, *against* Masterson.

IN ERROR

Executors are liable as such only on the contract of their testator; and where they are sued on their own promise though they are named as executors, they cannot appeal from an award of arbitrators without entering into a recognizance of bail.

ON a writ of error to the Court of Common Pleas of *Montgomery* county, it appeared that this suit was brought in that court by the defendant in error, Elizabeth Masterson, against the plaintiffs in error, John Masterson and Christopher Tenant, executors of Henry Masterson deceased

The declaration contained two counts, the first of which set forth that Henry Masterson on the 6th of November, 1818, made his will, by which among other things he bequeathed to

his wife, Elizabeth (the plaintiff below) the interest of the money arising out of his estate for the term of five years after his decease, she remaining single and maintaining and educating his minor children thereout, and directed the interest of the residue of his estate, after paying to his children certain legacies, to go to the support of his wife and minor children as long as they could live comfortably together, but should this not happen to be the case, or should his wife marry again, then it was his will that suitable places should be provided for his minor children, and that his goods and effects should then be sold, and the money arising from such sale be considered as part of his estate, and that his wife should then draw one-third part of the interest arising out of the estate during her natural life, and of his will, appointed the said John Masterson and Christopher Tenant executors; that the said Henry Masterson died on the 3d of June, 1819, and that the said John and Christopher proved the will and took on themselves the burthen of its execution, and possessed themselves of the real and personal estate of the testator, to the amount of six thousand dollars, beyond all debts, funeral expenses, and legacies. It averred that the said Elizabeth had always since the death of the testator, remained single, and had maintained, supported, and educated the minor children of the testator, and that she and they had always lived, and still live comfortably together. By reason whereof the said executors became liable to pay her the interest of the testator's estate, amounting to the sum of one thousand dollars, being the amount due to her from the time of instituting a former *suit against the said executors, to wit, at August Term, 1829, No. 45, to the [*138] time of instituting the present suit, and being so liable, the said executors did assume, &c.

The second count was for money had and received by the said John Masterson and Christopher Tenant, (without naming them as executors,) for the use of the said Elizabeth Masterson.

The cause was submitted to arbitration, on a rule taken out by the plaintiff below, and on the 22d of October, 1831, the arbitrators filed an award in favour of the plaintiff for three hundred and eleven dollars and eighty cents.

[Masterson and another, Executors, *v.* Masterson.]

From this award, one of the defendants below entered an appeal in the following form:

In the Court of Common Pleas, &c.

Elizabeth Masterson
v.
John Masterson and Christopher Tenant, Executors of the last will and testament of Henry Masterson, dec'd.

Am. Ac. Case.
On the 22d of October, 1831, the arbitrators report in favour of the plaintiff, three hundred and eleven dollars and eighty cents.

Be it remembered that on the 29th day of October, 1831, John Masterson, one of the above-named defendants, appears in the prothonotary's office, at Norristown, and enters an appeal from the award of arbitrators in the above case, in the Court of Common Pleas, of said county of Montgomery.

(Signed)
JOHN MASTERSON.

Taken and subscribed the 29th day of October, 1829, before me,

J. FRY, JR., Prothonotary

On the same day an affidavit was filed by John Masterson, that it was not for the purpose of delay that the appeal was entered, &c., but he gave no bail on the appeal.

A *fi. fa. de bonis propriis* having issued to November Term, 1831, on motion of the defendant's attorney, a rule was granted on the 25th of November, 1831, to show cause why the *fi. fa.* should not be set aside, and on the same day the plaintiff's attorney obtained a rule to show cause why the appeal should not be dismissed.

On the 3d of February, 1832, both rules were made absolute.

On the 20th of the same month, an *alias fi. fa. de bonis propriis* was issued, upon which this writ of error was sued out.

The error was assigned in striking off the appeal from the award of arbitrators.

[Masterson and another, Executors, *v.* Masterson.]

**Rawle, Jr.*, for the plaintiffs in error, cited M'Culloch *v.* Sample, 1 Penn. R. 422; La Fitte *v.* La Fitte, [*139] 2 Serg. & Rawle, 107; Gallagher *v.* Jackson, 1 Serg. & Rawle, 492; 2 Saund. 117, note; 1 Chitty Pl. 103; Strohecker *v.* Grant, 16 Serg. & Rawle, 237.

Potts, contra, referred to Bixler *v.* Kunkle, 17 Serg. & Rawle, 298; Morrow *v.* Brenizer, 2 Rawle, 185; Wilson *v.* Wilson, 3 Binn. 557.

Per Curiam.—It has been determined that an action for a legacy may be brought against an executor, in a representative capacity, as in Foulk *v.* Brown, 2 Watts, 209, determined at the last term for Harrisburg, which was an action of debt in the *detinet*. In other respects its features were less distinct, but the question being open to construction, was decided in a way best calculated to preserve the constitutional franchise free from impediment. Can the action before us be so considered? The foundation of it is the defendant's promise, not the will. But as executors cannot promise or covenant as such, so as to make themselves liable as executors, they are liable in a representative character, only on the contract of their testator. Naming them as such, though a circumstance to be weighed in a doubtful case, such as Foulk *v.* Brown, is by no means decisive; to be conclusively so, the declaration must be framed on the will, and not on any evidence of responsibility subsequent to it. The defendants, therefore, being sued on their own promise, were not entitled to appeal without bail.

Judgment affirmed.

Cited by Counsel, 5 Wh. 115; 2 Wh. 347; 6 W. & S. 505; 7 C. 236; 1 S. 344.

Cited by the Court, 3 W. & S. 173; 5 Barr, 511; 2 J. 350; 2 H. 356.

[*140] *[PHILADELPHIA, FEBRUARY 14, 1835.]

Adam Miller and Elizabeth his Wife, formerly Schneider, in Right of his Wife, and Mary Hoffman, *against* John Schneider.

CASE STATED.

Testator devised certain real estate in the first instance to his daughters in fee simple; and afterwards directed that in the division of the estate, the real property should be valued and allotted to the sons: and that the shares and dividends of his real and personal estate in his will given or intended for his daughters, should remain and be vested in his wife and sons in trust for the separate use of his daughters for life, with limitations over in the event of their death without leaving children. He further directed that the shares of his daughters should be placed at interest, and the principal and interest paid to his daughters from time to time, as his executors should think best, and that the principal of the dividends of his daughters, in the valuation of his real estate, if taken by his sons at the valuation, should not be demandable by his daughters under five years. The sons refused to take at the valuation. Held, that the case had not arisen under which the trusts of the will as to the daughters' portions could go into operation: and that they were entitled to partition.

PARTITION.—It was agreed that the court should give judgment and award a writ to make partition according to the purparts of the parties, in case they were of opinion that the plaintiffs were entitled to partition.

A case was stated for the opinion of the court in substance as follows:

John C. Schneider, the father of the plaintiffs Elizabeth and Mary, and of the defendant, died in February, 1802, seized of the real estate as set forth in the declaration, having made his last will and testament, bearing date the 14th day of November, 1799, whereby he devised all the residue of his real and personal estate, to his four children, John, Mary, Michael, and Elizabeth, their heirs, executors, administrators, and assigns, to be equally divided between them, part and share alike, as tenants in common, subject to certain limitations, which are as follows:—

[Miller and another *v.* Schneider.]

"Provided also, and it is my mind and will, that in the division of my estate between my said children, all my messuage and lots of ground in the said city of Philadelphia, shall be valued by three or more credible and judicious persons, and allotted at such valuation to my said son Michael Schneider, and his heirs and assigns: and that my plantation and lands in Bristol township with the appurtenances, shall likewise be valued by three or more judicious men, and at such valuation allotted to my said son John, and his heirs and assigns: and that all the shares and dividends of my real and personal *estate, in this my will, given or intended for my said two daughters Mary and Elizabeth, shall, during the [*141] natural lives of my said daughters, remain and be vested in my wife, Elizabeth Schneider, and my said sons, John and Michael Schneider, and their heirs and assigns, in trust for the sole and separate use and behoof of them my said daughters respectively, so that the husbands of the said Mary and of the said Elizabeth respectively, shall not have any right or interest whatsoever therein, neither shall the same be subject to or liable for the debt or debts of such husband or husbands, but the same dividend of real and personal estate, or the rents, interest, and income thereof shall, from time to time, be paid to and received by my said daughters, each of them for her own dividend into her own hands for her sole and separate use only, and her own receipts from time to time, taken for the same, whether sole or covert, and that in case of the death of my said daughters, or either of them, without child or children surviving such decedent, such part and residue of the dividend of the real and personal estate, as shall be and remain then undisposed of by such decedent, shall revert to and be equally divided between all my surviving children, and the lawful issue of them that shall be then deceased, their respective heirs and assigns, so nevertheless that such lawful issue take and receive such part and share only, as his, her, or their deceased parent might have taken if then living." After appointing his said wife and sons his executors, the will proceeds: "And I do will and direct, that the shares and dividends of my said daughters, shall at the discretion of my said executors and the survivor

of them be placed and kept out at interest on good and sufficient security; and the principal and interest paid to and applied for the use of my said daughters, from time to time, as my executors and the survivors of them, from time to time, shall think best; and that the principal of the dividends of my said daughters in the valuation of my real estate, if taken and accepted by my said sons respectively, at such valuation, shall not be demandable by my said daughters under five years, which I think is a sufficient time to enable my sons to raise and pay the money, but the interest shall accrue and be paid annually during that time."

Michael and John, to whom portions of the real estate were allotted, to be taken at a valuation, declined to accept the same. Michael died in August, 1822, unmarried, intestate, and without issue, leaving the plaintiffs, Elizabeth and Mary, and the defendant, his heirs, and next of kin.

Hubbell, for the plaintiff, contended that the plaintiffs were entitled to partition. The limitation in trust for the separate use of the daughters for life, and then over did not take effect; that provision in the will being intended to operate only in case the sons took at the valuation. Even if the trust did [*142] arise, the daughters were *equitable tenants for life, with full power of appointment. And in Pennsylvania the owner of an equitable estate may maintain partition. Brown *v.* Willing, 7 Serg. & Rawle, 467. He also cited Sudg. on Powers, 97; 2 Dall. 257.

Troubat, contra, admitted that the plaintiffs could recover their shares of Michael's fourth part. But as to the daughters' shares under the will, should partition be allowed of them, it might be in the power of the husbands to take the money which the court could not prevent, and thus the express object of the proviso be defeated. The plaintiffs have only equitable estates for life, and no permanent partition can be made, if any of the parties are entitled only to particular estates.—He cited Alnatt on Part. 77; 6 Vez. 498; Ram. on Wills, 31, 32, 53, 109.

The opinion of the court was delivered by

[Miller and another *v.* Schneider.]

SERGEANT, J.—The question in this case is, whether in the events that have occurred, the limitations in trust for the separate use of the daughters for life, and then over, take effect. If they do not, the plaintiffs are entitled, under the will, to one-fourth each of the real estate, as tenants in common. It is admitted by the defendant, that the one-fourth which belonged to Michael, passed, on his dying intestate and without issue, to the plaintiffs and defendant, as his heirs at law, and that the plaintiffs are entitled to one-third each of that one-fourth: but he contends that as to the daughters' shares under the will, they remain vested in him, subject to the trusts therein contained, and that partition ought not to be made.

The first impression produced by the perusal of this will is, that the estates devised to the daughters, whether converted into personalty, or remaining real estate, are subjected to the limitations in trust: but on an attentive examination of it, we are satisfied, that such a construction is irreconcilable with its general design, and with justice to all the testator's children: and that the provision applies only in case of the sons taking at the valuation.

It is to be observed that the estate, both real and personal, is, in the first instance, given after the termination of the wife's interest, to the four children, and to their heirs, executors, administrators, and assigns, equally to be divided between them, as tenants in common, subject to the subsequent limitations. The inheritance is thus vested in the daughters by apt words, and ought not to be taken from them, unless clearly so intended by the testator. The will goes on to direct, that in the division of the estate, the real property should be valued and allotted to the sons, and that the shares and dividends of his real and personal estate, in his will given or intended for his daughters, should remain and be vested in his wife and sons, whom he appoints executors, in trust for the separate use of the daughters *for life, with limitations over. This [*143] seems to form one entire provision, and to contemplate the raising of the trust only in case of a division by the sons taking the lands at the valuation, on which the daughters' rights in the land would be divested, and they would become

entitled to money. The testator may possibly have deemed it prudent to provide a trust for money, which was not necessary in case of land; and there is certainly a difference between them, the money, if left to the daughters, might be claimed at once by the husband, as his own. The land would remain the wife's estate, unless she voluntarily consented to part with it by a deed acknowledged separate and apart from her husband, under the formalities provided by law, in relation to the transfer of the estates of *feme coverts.* It is true that from the influence of the husband, this is not always a protection: but it is one which in many instances enables the wife to frustrate the sale, or make terms with a purchaser.

But what chiefly weighs with me in giving this construction to the will is, that the daughters would enjoy rights and benefits if the sons took at the valuation, which it is impossible for them to receive in any other way. For by the will the executors are, from to time, to apply and pay over to the use of the daughters, both principal and interest of the shares and dividends; and by a subsequent clause, the principal of the dividends of the daughters in the valuation of the real estate, if taken by the sons, is not to be demandable by the daughters under five years; which plainly implies that the daughters should be paid the principal sum within a certain time. It is, moreover, observable, that the limitation over in the event of the daughters dying without child or children surviving, is only of the residue of the dividend which should then remain undisposed of by them; a clause which seems to invest the daughters with the privilege of disposing of the fund to supply their necessities. But how can the daughters enjoy or dispose of any portion of the principal if their shares are to continue land impressed with the trusts? Such a construction, moreover, makes it the interest of the sons to refuse to take the lands at a valuation, and thus to defeat the will of the testator; because by so doing, they or their children may chance to acquire the daughters' shares undiminished, in case of their decease without child or children. For I see no mode of compelling the sons to sell the daughters' shares in the land, and convert them into money; nor even a power in the

will to make a clear title in fee simple for them, if the sons were so inclined, without taking at the valuation. The consequence is, that the sons, by their act or incapacity, might defeat one great object of the will, namely, the right of the daughters to enjoy the principal as well as the interest of their portions, and might restrict them to a pittance of rents during their lives, for the benefit of the descendants of the sons. This, it is very apparent, was never designed by the testator. On the contrary, his intention was, that the sons should take the lands, and pay to the *daughters their portions in money, within a certain period, to enjoy and dispose of to their separate use, as their occasions might require, with a limitation over of what might remain undisposed of. If the sons lose any benefit they might expect under the trust, it is because the dispositions of the testator have not been carried into effect. [*144]

As to the word rents, used in the will in relation to the trust, that may be satisfied by referring it to such rents as the sons might receive, or be liable for between the period of the widow's marriage or death, and their taking the land at a valuation. The other phrases in the will, such as shares, dividends, apply as well, if not better to money than land.

On the whole, my opinion is, that the case has not arisen under which the trusts in this will, as to the daughters' portions, could go into operation, and therefore, the real estate remained equally vested in the four children, as devised by the prior clause of the will. Under the will, the plaintiffs are tenants in common of one-fourth each: by the decease of Michael, they inherit one-third each of his fourth. The plaintiffs Elizabeth and Mary and the defendant John, are now entitled, as tenants in common in fee simple, to one-third each of the whole real estate devised by the will. It follows, that partition may be made, and, therefore, according to the case stated, judgment is to be entered to that effect.

Judgment *quod partitio fiat.*

Cited by Counsel, 4 Wh. 441; 8 W. 11; 3 W. & S. 230; 31 S. 504.

[PHILADELPHIA, FEBRUARY 14, 1835.]

Boyle and Others *against* Abercrombie.

APPEAL.

J. A. by a postnuptial settlement made to secure moneys borrowed by him from the wife's separate estate, secured to her previous to marriage, conveyed land in trust for the sole and separate use of his wife, with full powers of limitation and appointment to her, with or without the concurrence of her husband.

J. A. and his wife mortgaged all the estate, right, title, and claim of both of them in the premises to a *bona fide* lender of money. Held, that the settlement was not on its face fraudulent as against creditors of the husband; and there being no evidence of fraud to impeach it, it was held, that under a sheriff's sale of the premises, on a judgment against J. A., subsequent in point of time to the mortgage, the mortgagee had a right to come upon the fund for payment, and was entitled to priority over the judgment.

THIS was an appeal from the decision of the District Court for the city and county of *Philadelphia*, awarding distribution [*145] of the *proceeds of the sheriff's sale, under a *venditioni exponas* issued in the above case.

It was a contest between the plaintiffs who claimed the proceeds of sale under a judgment on an award of arbitrators, filed July 21st, 1832, and Josias Pennington, who claimed under a mortgage of the property executed by Abercrombie and wife to him on the 7th of June, 1832.

The plaintiffs issued their writ on the 26th of May, 1832, and on the 5th of June, 1832, filed their declaration and entered a rule of reference.

The court below confirmed the report of the auditor, awarding in favour of the mortgagee.

By an indenture dated the 1st of June, 1832, James Abercrombie, Jr., reciting that he had heretofore borrowed and received from his wife, Mary F. Abercrombie, the sum of forty thousand dollars and upwards, out of her proper moneys and separate estate, which he had always intended to secure to her by the conveyance and settlement of any property he might possess to the same uses and trusts as the money so received

and borrowed was subject to; and reciting a former conveyance, dated November 6th, 1816, of a lot of ground at the northwest corner of Broad and Callowhill streets, to one Kennedy Owen, in trust for the sole and separate use and benefit of the said Mary F. Abercrombie, and reciting sundry mesne conveyances whereby for the purposes of enabling him to effect certain arrangements with respect to an annual rent charge thereon, the same had become vested in the said James Abercrombie, Jr., who having fulfilled the object of the conveyance to him, was desirous of conveying the property in trust for his wife, in the same manner as it was held by the said Owen; it was witnessed that the said James Abercrombie, Jr., in consideration of the premises and of the sum of five dollars to him paid by James Campbell out of the proper moneys of the said Mary F. Abercrombie, did convey to the said James the said lot of ground, upon trust, nevertheless, to make leases of the same from time to time during all the term of the natural life of the said Mary F. Abercrombie, and to receive the rent, issues, and profits thereof, and pay and apply the same or the net amount thereof to the said Mary F. Abercrombie for her sole and separate use and benefit, as if she were a *feme sole*, so that the same should not be subject to the control, or liable for the debts of her said husband, or of any other husband she might thereafter marry, for which said rents, issues, and profits the receipts of the said Mary F. Abercrombie, whether she were covert or sole, should be full and sufficient discharges and releases; and from and immediately after the death of the said Mary F. Abercrombie, then upon trust to the proper use and behoof of all and every the child or children of the said Mary F. Abercrombie, and their heirs and assigns forever. But if the said Mary F. Abercrombie should die without leaving a child or children, or the *descendant of a child or children, living at the time of [*146] her death, then upon trust for such person or persons, and for such uses, trusts, and purposes as she, notwithstanding any coverture, might by her last will and testament by any instrument of writing in the nature of a last will and testament, limit and appoint, and in default of such limitation and ap-

pointment, then upon trust for the right heirs of the said Mary F. Abercrombie forever; provided always, and it was thereby expressly declared, agreed, and understood by and between all the parties thereto, that it should and might be lawful for the said Mary F. Abercrombie at any time during her natural life, and whether she were covert or sole, by any deed or deeds, conveyance or conveyances duly executed to revoke, annul, and make void all and every or any the use and uses, estate and estates thereinbefore limited, expressed, and declared of and concerning the same, and to grant, bargain, and sell the said lot of ground and premises thereby granted, with the appurtenances, with or without the co-operation or concurrence of her present, or any future husband, unto any person or persons, and for such consideration or considerations as she might think proper, and to declare new and other uses of the same as to her should seem expedient, anything therein contained to the contrary thereof, in any wise, notwithstanding.

James Abercrombie, Jr., and Mary his wife, mortgaged the premises to Josias Pennington, by an indenture bearing date the 7th of June, 1832, which contained the following recitals and provisions:

"Whereas the said James Abercrombie, Jr., and Mary F. Abercrombie, now stand indebted to the said Josias Pennington in the sum of five thousand three hundred and eighty dollars for the like sum of current money heretofore lent them by the said Josias Pennington, on condition that they would secure the same to him by a mortgage on the lot or piece of ground hereinafter described,—and whereas the said lot or piece of ground hath been lately conveyed in trust for the use and separate benefit of the said Mary F. Abercrombie, by the said James Abercrombie, Jr., with full power and authority to the said Mary F. Abercrombie to convey and dispose of the said property as she might think proper. And whereas it is the intention of the said Mary F. Abercrombie to execute the power and authority so reserved to her. Now, therefore, this indenture witnesseth, that the said James Abercrombie, Jr., and Mary F. Abercrombie, for and in consideration of the premises and of the sum of four dollars to them in hand paid by the said

[Boyle and others *v.* Abercrombie.]

Josias Pennington, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have bargained, sold, enfeoffed, and conveyed, and by these presents do bargain, sell, enfeoff, and convey unto the said Josias Pennington, his heirs and assigns, all that lot or piece of ground situate at the northwest corner of Broad street and Callowhill street, (describing the premises,) together with all and singular the buildings and improvements thereon erected, *and the reversions and remainders, rents, issues, and profits thereof and all the estate, right, title, and [*147] claim of the said James Abercrombie, Jr., and Mary F. Abercrombie in and to the same, and to every part and parcel thereof, to have and to hold the said lot or piece of ground and premises with the appurtenances unto the said Josias Pennington, his heirs and assigns, to and for his and their only use and benefit, and for no other interest, use, or purpose whatever. Provided always, and these presents are made on this express condition, that if the said James Abercrombie, Jr., or Mary F. Abercrombie, their or either of their heirs, executors, or administrators, do and shall well and truly pay unto the said Josias Pennington, his exeeutors, administrators, or assigns, the said sum of five thousand three hundred and eighty dollars on or before the 8th day of December next, (1832,) with full legal interest thereon, then this instrument of writing and every matter and thing herein contained shall be utterly null and void.

"And the said James Abercrombie, Jr., and Mary F. Abercrombie shall thereupon and thenceforward stand seized of and be entitled to the same full and beneficial title and estate in said lot or piece of ground that they, or either of them had before the execution of these presents; and the said James Abercrombie, Jr., and Mary F. Abercrombie do hereby jointly and severally covenant and agree with the said Josias Pennington, his heirs, executors, administrators, and assigns, that they and each of them shall and will at all times and at any time hereafter on the request of the said Josias Pennington, make all and every such other, and further conveyance and assurance of the above demised premises, as may be necessary

to effectuate the object and intention of the parties hereto as before expressed."

Stroud for the plaintiffs.

The deed of trust of the 1st of June, 1832, divests James Abercrombie, Jr., of all title. Pennington's mortgage being entirely of Mary F. Abercrombie's interest, is unaffected by the sale of James Abercrombie's interest. He must look to the land and can't take the money. The husband's joining in the mortgage was merely nugatory. The purchaser can take only the right, title, and interest of James Abercrombie. A party cannot claim in inconsistent rights. He cited Irwin *v.* Tabb, 17 Serg. & Rawle, 419; Adlum *v.* Yard, 1 Rawle, 171; Allen *v.* Getz, 2 Penn. Rep. 310; Findlay *v.* Stump, 2 Rawle, 168; Ebright *v.* Bank, 1 Watts, 397.

He contended further that the deed was fraudulent on its face, and however good as between the parties, if fraudulent it is void as to creditors. Osborne *v.* Moss, 7 Johns. 161; Thompson *v.* Dougherty, 12 Serg. & Rawle, 448; Mackey *v.* Cairns, 5 Cow. 547.

Meredith, with whom was *Chauncey, contra,* argued that the mortgagee had the prior lien. The opposite argument is founded on the presumption that the deed is fraudulent. It is not so on its face. [*148] *It is not voluntary, but to pay a debt of the wife due her for money lent J. A. We do not claim under the deed of trust, but as a creditor to whom a pledge has been given. Pennington is a *bona fide* purchaser without notice of any fraud. A voluntary deed if recorded is good against subsequent creditors. They cited Lancaster *v.* Dolan, 1 Rawle, 231.

The opinion of the court was delivered by

Sergeant, J.—The sheriff's sale under the judgment of Owens' administrators, against James Abercrombie, passes to the purchaser all the right, title, and interest of James Abercrombie, in the lot sold; and the mortgage being of all his right, title, and interest, the mortgagee has a right to come

upon the fund for payment. If instead of a mortgage, the creditor had obtained a judgment, his right could not be questioned: and there is no difference between the two in the efficacy of the lien, though there is in their nature; the one being a specific lien, the other a general one. The mortgage, though prior to the judgment, is not the first lien: and it is therefore admitted the case does not fall within the provisions of the act of assembly of the 6th April, 1830, and the land is, by the sheriff's sale discharged, so far as respects James Abercrombie, from all liens against him.

It is objected by the judgment creditors that the deed of the 1st June, 1832, divested James Abercrombie of all title, and that Pennington's mortgage is only of the interest of the wife transferred under her power, the joining of James Abercrombie, in the mortgage being nugatory—and therefore the mortgagee must look to the land under the title derived from her. It is true, the deed of trust of the 1st June, 1832, divests James Abercrombie of all title. But the mortgagee might choose not to rely solely on the title of the wife. The property was previously James Abercrombie's, and he might deem it a measure of prudence to include his title also in the security, and avail himself of a double assurance for his money, and I know of nothing that forbids a person lending money from including in his mortgage as well the donor as the donee of the tract mortgaged. This is done here expressly: the mortgage is in the name of both, transfers all the right, title, and interest of both, and is executed by both, and there is, on the face of it, some reason to suppose the junction of the husband was not nominal but substantial, because the mortgage recites a loan to both by the mortgagee on condition of their securing him by a mortgage of the premises. It cannot be pretended that the interest of the husband was worthless, since we see a sale of it has produced the moneys about which the parties are contending.

It is further objected by the plaintiff, that the deed of trust and mortgage were fraudulent; and there are circumstances on the face of the transaction, such as the execution of the first

[*149] of these *conveyances immediately after a suit commenced, and of the mortgage whilst a reference was pending, which cast a strong shade of suspicion over it. But suspicion is not proof; and in the absence of evidence we can judge of these instruments only by their face. The deed of trust is a marriage settlement made after marriage, and the general rule is that such settlement is fraudulent and void against all persons who were creditors of the husband at the time of the settlement. 2 Atk. 520; 3 Ib. 413; 2 P. Wms. 364. But there are exceptions to this rule, one of which is, when it is made in pursuance of articles before marriage, Beaumont *v.* Thorpe, 1 Ves. 127; and the deed of trust recites, that this property was originally settled on the wife to repay moneys borrowed of her separate estate, secured to her previous to marriage, and was afterwards conveyed by her through C. Riddle to her husband, to enable the latter to effect certain arrangements with respect to a rent charge upon it: and it purports to be made to restore the property to her. If so, and we have no evidence to the contrary, the deed of trust might be valid against creditors; and if it were even void as respected the parties, it might not be so to the mortgagee if he lent his money *bona fide*. But it is not necessary to give any opinion on this point, because in this suit the mortgagee does not claim under the deed of trust: the claim is of the right of James Abercrombie, which is paramount to that deed, and as to that, the only question that could be raised would be whether a person in debt may not mortgage his property to a *bona fide* lender of money, a question which could admit of no doubt.

If the mortgage was collusive, and for the mere purpose of abetting James Abercrombie in defeating his creditors, the security would be void, and the conduct of the abettor criminal. But no evidence was given on this head. One of the plaintiffs in the judgment, purchased at the sheriff's sale, and holds the sheriff's deed. If he can show fraud, and thus destroy the deed of trust and the title of the mortgagee, he will, so far as we can judge at present, hold the land discharged of the residue of the mortgage claim. But there is no ground laid before us to decree the mortgage fraudulent, or

[Boyle and others *v.* Abercrombie.]

to reverse the decree of the court below, by which the money is awarded to the mortgagee, as the prior lien creditor.

Decree affirmed.

Cited by Counsel, 8 W. & S. 431; 7 Barr, 531.

*[PHILADELPHIA, FEBRUARY 14, 1835.] [*150]

In the Matter of a Road in Plymouth Township.

CERTIORARI.

It is not a sufficient ground for setting aside a report of a road jury, that the jurors are entertained on the day of the view at the house of a petitioner, and at his expense, there being no special circumstances of abuse in the case.

THIS was a *certiorari* to the Quarter Sessions of *Montgomery* county to remove the proceedings in the case of a road from the Mill-road to the Watson's ford-road. There had been a review altering the road as laid out by the first jury—and afterwards a re-review under the proceedings in which a report was made in favour of the road as laid out by the first jury. Exceptions were taken to the report, which were overruled by the court, and the report confirmed.

It appeared that the jury had dined at the house of John Davis, one of the petitioners, on the day of the re-review; and were entertained at his expense. It did not appear, however, that Davis had in any manner attempted to influence the jury as to the course they should take.

Potts now contended that the court below should have quashed the report, because while deliberating on the proposed road, and before they had signed their report, the jurors had been entertained at the house of one of the petitioners.

Kittera, contra.

PER CURIAM.—The expenses of a re-review are borne by the parties at whose instance it was awarded; and we know of no reason why a petitioner should not entertain the viewers at

[In the matter of a Road in Plymouth Township.]

his own house instead of a tavern. Were this objection to prevail, few proceedings of the sort would stand a test so severe. An abuse in this particular might possibly give room for interference; but nothing of the sort appears in the evidence, and at all events, the court below was fully competent to determine the fact.

Order of the sessions affirmed.

Cited by Counsel, 6 H. 234.
A case in 8 Phila. 468, conflicts with this case.

[*151] *[PHILADELPHIA, FEBRUARY 14, 1835.]

Babb *against* Reed and Others, Trustees, &c.

APPEAL.

An association for the purpose of mutual benevolence among its members only, is not an association for charitable uses.

Its members, if not incorporated, are considered as partners in their relations to third persons, and the property of the association must be appropriated to pay the debts of creditors, not members of the association, before it can be applied to the payment of the claims of those who are members.

A mechanic's lien filed by a member of such an association against a building erected by it, is not available as against the liens of others not members.

APPEAL from the decree of the Court of Common Pleas of *Chester* county, distributing money arising from sheriff's sale.

The material facts were as follows:

About the beginning of the year 1832, a number of individuals in and about West Chester associated under the name of the West Chester Lodge, No. 42, of the Independent Order of Odd Fellows.

On the 28th day of March, 1832, Babb and wife, by a deed of that date, conveyed a lot of ground in West Chester to the defendants Reed and others, who are styled therein trustees on behalf of West Chester Lodge, No. 42, of the Independent Order of Odd Fellows, for the consideration of fifteen hundred and thirty-seven dollars and fifty cents, the whole of which was secured by a mortgage immediately given by the trustees

to the vendor. The objects of this purchase are declared by the trusts contained in the deed, which are substantially these. For the use of West Chester Lodge, No. 42, of the Independent Order of Odd Fellows, then established as long as it should exist, and after its dissolution (if it should be dissolved before the property should be disposed of) for the use of any other subsequent Lodge of Odd Fellows which should at any time thereafter be established in West Chester as long as such subsequently established Lodge should continue to exist; provided, that in all vacancies of time between the dissolution of one lodge and the establishment of another, the lot, hall, and appurtenances should be for the use of the burgesses and inhabitants of the borough of West Chester for public purposes, they keeping the premises in repair; and provided also, that the trustees should, under the direction of the Lodge No. 42, pledge and mortgage the lot and premises for the payment of debts, or sell and convey the whole of it, and apply the proceeds to the payment of the debts of the institution, after which the surplus to be disposed of as the said Lodge No. 42 should direct, so that the burgesses and *inhabitants [*152] of the borough of West Chester should have no part of the proceeds of such sale, but only the use and rents of the premises during the intervals which might happen before a sale was directed, and in which there might be no Lodge of Odd Fellows in existence.

The society of Odd Fellows, of which Robert Smith, Wm. Apple, John T. Haines, Wm. Adle, John Burns, and Angus M'Kay were members, immediately set about erecting a building. They appointed a building committee of five members, to wit, Abraham Marshall, Robert Ferguson, John T. Haines, Lewis W. Williams, and William Adle, who, under the direction of the Lodge, contracted with workmen, builders, and material men, most of whom were members of the lodge, though some of them were not. Some of the contracts were in writing, others were verbal. Neither William Everhart nor either of the members of the firm of Jones & Davis was a member of the society. The building was finished; a part of it was occupied by the Odd Fellows as a place of meeting, and several

rooms were rented out for some time, the rents being paid into the treasury of the Lodge.

The enterprise was not prosperous. The interest upon the mortgage was not paid. The mortgagee proceeded by *scire facias*, and to the term of February, 1834, a *levari facias* was issued, by virtue of which the lot, hall, and appurtenances were sold for the satisfaction of the debt for the purchase of the lot and interest, after satisfying which and the charges, there remained subject to distribution the sum of nine hundred and twenty-seven dollars and ninety-two cents, that being the whole sum which the hall, building, materials, and everything erected on the lot produced at sheriff's sale beyond the original price of the lot and interest.

The claims upon this fund for materials furnished and work done, were made by William Everhart, Jones & Davis, John Rutter, Wm. Adle, John Burns, Angus M'Kay, John T. Haines, and Wm. Apple.

The auditor appointed to report upon the claims of the different lien creditors, made a *pro rata* distribution of the money among the several claimants.

The court below confirmed the report of the auditor, and decreed distribution accordingly.

From this decree and adjudication an appeal was taken to this court, and the question was whether, under the circumstances above stated, Smith, Apple, Haines, Adle, Burns, and M'Kay, members of the institution, and owners of the property against which the aforesaid claims were filed, should take a share of the proceeds of the sale of that property to the prejudice of the claims of Wm. Everhart and Jones & Davis, who were not members of, nor in any way connected with the society of Odd Fellows.

Lewis for appellants.—The lodge of Odd Fellows, from [*153] whose *property the money in court has been derived by means of a sheriff's sale, is a voluntary association of individuals, for purposes of mutual advantage, and cannot claim the consideration of a charity, or the attributes and privileges of a corporation. A charity, properly so called, is of a

public nature. It reaches from itself to others—goes beyond its own doors into the world of misery, and selects its objects from the general mass. The lodge of Odd Fellows had no higher or more extended aim than that of reciprocal aid amongst its members in sickness or misfortune.

The law respecting such unincorporated companies is the same as in common partnerships. Watson on Part. 3; Gow on Part. 2, 4, 6, 7. In order to contract the relation of private partnership, nothing more is necessary than the consent of the members constituting the firm: and this consent may be either express, or implied from the acts of the parties. Gow on Part. 5. A mutual interest in the profits and loss of any lawful adventure makes the persons engaged in it partners, and liable to all the responsibilities of that relation, at least, as respects third persons, without regard to the nature of their business or the character of the contract between themselves. There may be a partnership to trade in land. Brady *v.* Colhoun, 1 Penn. Rep. 140. Also in the transportation of goods. Witmer *v.* Schlatter, 2 Rawle, 359. A partnership may exist between attorneys or farmers. Coope *v.* Eyre, 1 Hen. Bl. 37. A company formed for banking purposes contract the liabilities of partners. Hess *v.* Werts, 4 Serg. & Rawle, 356. If two persons, who are not partners in trade, draw a bill of exchange payable to themselves or their order, they are partners as to the transaction of the bill, though in every other respect, they are perfectly distinct. Gow on Part. 8; Carvick *v.* Vickerey, Doug. 653, n. Then, why may not a partnership exist between persons, who associate either to make a display, or to help each other in extremity, and in their society character build a hall, and make a profit by renting out rooms. It has, indeed, been decided, that a society for mutual relief in sickness, by means of a fund raised by subscription among its members, is a partnership, it having no corporate character. Beaumont *v.* Meredith, 3 Ves. & Bea. 180.

The society of Odd Fellows being partners, the members must submit to be ruled by the law applicable to all other partnerships. The joint effects are the property of the firm,

and not of the partners, and are liable, in the first instance, to the payment of the partnership debts. The partners are entitled only to a share of the surplus remaining after those debts shall have been discharged.

The debts due to Everhart and Jones & Davis, are the debts of the firm. They must be first paid. The other claimants being members of the lodge are not entitled to come in till all the creditors are satisfied. A partner to whom the partnership is indebted can have *no satisfaction but out of what may remain after all the joint debts are paid. Watson on Part. 329; 1 Atk. 227. [*154]

The building, from the sale of which the money in court proceeded, and upon which the claims of the appellants attached as liens, under the mechanic's lien law, constituted the whole tangible property belonging to the partnership. The deed by which this property was held, was made to trustees, in trust for the use of the lodge, without naming the *cestui que trust*. Can there be any doubt that the ownership of this property resided in the members of the lodge?

In equity the *cestui que trust* is always considered the actual owner of the land. Here, although the persons who were intended to take are not named, they are sufficiently described. Had the trustees refused to accept the trust their places might have been supplied under our acts of assembly to prevent the failure of trusts: and had they taken and held the property adversely to the association ejectment might, without question, have been sustained against them; that action in Pennsylvania being substituted for the English remedy by a bill in chancery. The circumstance of the *cestui que trust* being a body of unnamed and unincorporated persons can make no difference as to their capacity to take. See Beatty *v.* Kurtz, 2 Peters, 578–85; Witman *v.* Lex, 17 Serg. & Rawle, 91; Case of Sarah Zane's Will, 24, 45–6.

In this case there has been no difficulty in relation to the title, and the court is not called upon to decide any question between the parties to the deed. The trustees have performed their duties, and the objects of the trust have been attained. The Odd Fellows have occupied a part and let out the rest of

the hall, and, indeed, enjoyed in every respect, and to the fullest extent, the rights of ownership.

But supposing the Odd Fellows not to be partners, but joint owners, merely, can they enforce a lien upon their property, to the prejudice of William Everhart and Jones & Davis, who have no kind of connection with the lodge? The lien is attempted to be supported by the act of the 17th of March, 1806, commonly called the mechanic's lien law. The first section of that act declares, that "all and every dwelling-house and other building shall be subjected to the payment of the debts contracted for, or by reason of any work done or materials found," &c. And the second section of the supplement to the act passed the 28th of March, 1808, provides the means for enforcing the lien. Those means are, either by personal action against the debtors, or *scire facias* against the debtor and owner of the building.

The claim, thus made a lien upon the building, must be founded on contract either express or implied, and can be recovered, only by personal action, or by *scire facias*, which under this act is the same thing as an action. Those debts that are contracted for, are *liens for a certain period, and the process to be resorted to for their recovery, is such as is suited to enforce an adversary claim. [*155]

If there are any contracts between the Odd Fellows, who claim a share of the spoil, in this case, and the lodge, they are contracts between individual members of the lodge of the one part, and the same individual members and the rest of the lodge, on the other part. In other words, they are contracts between certain persons, and themselves jointly with others. If liens are to be the result of such contracts, and those liens enforced at the expense of third persons, it is obvious, that a wide door is thrown open to fraud, and the egregious absurdity of a man having a lien upon his own property, and thereby cutting out his own creditors is fully realized. A. may as well contract with A. as with A. B. and C. and set up a lien in consequence. The introduction of B. and C. into the business, only serves to bewilder the view, without altering the principle or changing the certain effect; which is to snatch a portion of the

property from the grasp of the joint creditor. Each man's claim, if a lien at all, is necessarily a lien upon his own share of the joint estate as well as upon that of his fellow-members. Sanction the claim here urged, and a series of contracts may be made to run through a lodge, embracing every man in it and making every one bear to himself the double relation of creditor and debtor. A. may contract with A. B. and C., &c., B. with B. A. C., &c., C. with C. A. B., &c., and thus the associators may severally cover the property of the association with incumbrances to any conceivable amount. But a man cannot contract with himself, nor can he sue others with whom he is joint-tenant or tenant in common, *ex contractu.* 1 Chitty Pl. 27; 2 Bos. & Pul. 120. The claim is a legal anomaly, and is neither justified by precedent, nor sustained by principle.

Had the enterprise been prosperous, and the building been sold for more than its first cost the Odd Fellows would have enjoyed the whole benefit of the increase in value. Everhart and Jones & Davis could not have shared in the profits. It is nothing more than reasonable therefore, that having in their favour the chances of gain they should take upon themselves the hazard of the loss. It is flagrantly unjust in them to attempt to make us, who could have derived no advantage whatever from the speculation, participate equally with them in the consequences of their ill fortune or bad management.

Dillingham, for the defendants in error.—This association is, as has been stated and argued by the counsel for the plaintiff in error, an associatien for charitable objects. The first words of the preamble to the constitution avow the object. *"To promote harmony, friendship, love, and truth." The preface† states that the society is "founded on the broad principles of benevolence and charity"—and again that it "comprises all the provisions of a regular benevolent [*156] *society." We are told that it aims, "to promote the happiness and improves the condition of man," and "to enforce on the mind the genuine principles of morality,

* Pamphlet copy of the Constitution, &c. † Ib.

benevolence, and philanthropy." The warrant of dispensation to establish this society, states the object to be "for the encouragement and support of brothers of the said order, when in sickness, distress, or on travel, and for the purpose of benevolence and charity."

The opposite argument assumes that all the doctrines, peculiarities, technicalities, and liabilities of a partnership under the law merchant are to be visited upon this benevolent and charitable association. This we deny. The authorities cited against us, are British precedents, decided since the Revolution, and could only be read as a part of the law merchant. We would drive out those "money changers," and establish a distinction between the rules applicable strictly to a partnership under the law merchant, and those applicable to associations for religious, literary, or charitable purposes.

The argument cannot be more strongly stated than in the able and well considered decree of the court below. *"The mere circumstance of being members of the society of Odd Fellows, as we understand the association, does not constitute them a partnership in any shape, so as to make one liable in his private estate for the debts contracted by his fellows; and even if they must be considered as partners or tenants in common, still a lien filed by one against a building, owned by all, would be available under the act of assembly. No man can be made a partner with others without his own agreement or consent, expressly or impliedly given to that effect. Partnership is a contract between two or more persons for joining their money, goods, credit, labour, &c., in a common enterprise, for their mutual profit, and agreeing to bear mutual loss; and third persons and all the world have a right to interpret certain acts into an agreement of partnership, such as sharing the profits and loss of business or enterprise; or even suffering one's name and credit to be used with others will make him liable as a partner although there may be no original articles of partnership shown; for by such acts he consents, so far as third persons and creditors are concerned,

* Manuscript opinion of Judge Darlington.

to be held a partner. But the mere circumstance of two or more, either purchasing or holding property together or in common, is not enough to constitute them partners—there must be an agreement, or consent to be so considered, and as such, liable by words or by acts. Take the familiar case of a neighbourhood raising money by voluntary subscription to purchase a lot and build a school-house. They contribute unequal sums according to their will or ability; they appoint a committee to build the house which is to be for the mutual benefit of all the contributors—it is owned by them through [*157] the *medium of trustees—they are a private unincorporated company associated for a common object. But are they a partnership? Suppose the building committee should be unfaithful and squander the funds, could any suppose that all the subscribers are to be considered as a partnership, and the man who had contributed one dollar's subscription be held liable to the amount of the whole estate for the default of the building committee? Certainly not; simply because the subscribers never contracted to become partners, nor held themselves out to the world as partners, and the builders (in the absence of a mechanic's lien law) would look only to the personal responsibility of those who employed them. Neither will that general indication of a partnership, a participation in the profits, always be found infallible—it is evidence of an agreement of copartnership, but not conclusive."

This last position, the learned judge supports by the case of seamen employed in the whale fishery, who are often compensated by a certain portion of the profits, (if any,) and cites the case of Price *v.* Austin, 17 Mass. Rep. 205.

In the present case, the members of the society of Odd Fellows never agreed with each other to be co-partners, and liable as such, "neither is there any evidence from their conduct to the world, such as holding out the credit of names or of a firm dealing or trading in land, goods, stocks, or the like, or of participation in the profits or loss, which can entitle third persons to hold them liable as partners." But admitting them to be partners, the words of the act of assembly of 17th March, 1806, (Purdon's Digest, 545,) are large enough to cover the case and

give them a lien. The words of this act are more broad than those of the prior lien law, and extend the lien to all cases of "materials found." Steinmetz Ex'r *v.* Boudinot, 3 Serg. & Rawle, 541.

If this objection is to prevail against Odd Fellow claimants, it should prevail *a fortiori* against the stockholder claimants, one of whom is of the firm of Jones & Davis. Mr. Davis is more strictly a part owner, than the Odd Fellows. The fact of stock ownership, independent of the society's interest, shows that as a society they had no interest beyond their charitable and benevolent objects.

Haines and Adle, who are also of the building committee, stand in respect to Everhart, and Jones & Davis, on the same footing as any two judgment or mortgage creditors, claiming distribution of a common fund, where there is a debt from one to the other. In such a case, can the creditor claim to receive the amount due from his debtor, out of the common fund? Has he a lien for it? The contract of the building committee was purely personal, and is superadded to the lien. What their recourse over to their fellow-members may be, is another question and a different one.

In the case of Sarah Zane's Will in the Circuit Court of the United *States for this district (see pamphlet copy of the case, *passim*) a learned, elaborate, and careful opinion was given, which, if sound, places our case clear of difficulty. [*158]

It reviews the history of these unincorporated societies in Pennsylvania, for religious, literary, and charitable purposes, and comes to the conclusion that they should be regarded in the law, as corporations by prescription. This doctrine is certainly more conformable to the common understanding of the community and to common sense, than to visit upon them the strictness and stringency of the law of co-partnership technically so called.

The question there was, as to the right to hold lands by devise. But this involves the whole question in our case. If they are known to the law for any purpose as corporations by

prescription, "bodies politic," the immunity will embrace us. This immunity we claim as a part of the common law of Pennsylvania.

There is nothing in the objection that a man cannot contract with himself when the law recognizes a corporation or a trust, it discriminates between the property of such corporation, or the trust fund, and the individual liabilities of the corporators or trustees.

Tilghman, who was to have replied, was relieved by the court.

The opinion of the court was delivered by

SERGEANT, J.—The association from whose property the moneys in court proceeded, was formed and conducted without incorporation. Its objects are stated to be, the employment of its funds in purposes of mutual benevolence, amongst its members and their families; but these cannot be deemed charitable uses under the common law of Pennsylvania or the statute 43 Elizabeth. The twenty-one cases enumerated in the statute, and the others constructively within it, are of a public nature, tending to the benefit or relief, in some shape or other, of the community at large, not restricted to the mutual aid of a few. And if the objects of the association were within the class of charitable uses, it does not follow, as has been contended, that it is clothed with the character of a corporation, without a charter obtained under the act of 1791, or by virtue of a special act of assembly. Equity finds ways to sustain charitable trusts or uses, without necessarily creating corporations for that purpose—the objects and purposes of the society are of a beneficial kind, and as such might perhaps be embraced by the act of 8th April, 1833, extending to beneficial societies and associations the provisions of the act of 1791. In the absence of any actual charter, it is a voluntary association of individuals, and the members, in their relations to third persons, are to be considered as partners, in the same manner as individuals associ-

[*159] ated for the purpose of banking; Hess *v.* Wertz, *4 Serg. & Rawle, 356; or joint stock companies, at one

time so frequent in England for commercial and speculating purposes.

That being the case, the claimants must be divided into two classes: First, those who never were members of the association, second, those who were members at the time these claims originated. The latter class, considered in the light of partners, are with the other members of the association jointly and severally liable, for the payment of the debts of the first class; and are, moreover, seeking to enforce a lien on their own property, by which the former class will be deprived of a portion of their debts. It is possible that persons jointly owning lots of ground, and erecting buildings upon them, to which they furnish work and materials may file liens under the acts of assembly, and maintain them among themselves, on the ground that they are in *equali jure*, and to be considered as mutually waiving objections. But that a person can enforce a lien on his own building, at the expense of third persons who hold similar liens on it for debts contracted by the former to the latter, is not reconcilable with law or equity. At law the lien of the owner would merge in the property, since no man can be both debtor and creditor: and equity would not uphold it in order to place in the hands of the owner himself, a portion of that fund which ought to go to his creditor, whose debt was contracted on the faith of the fund.

We are, therefore, of opinion that the debts of Everhart, and of the firm of Davis & Jones, who were not members of the association, ought to be first paid out of the fund, before any part of it can be appropriated to the claimants who were members: and as there is not money sufficient to pay Everhart and Davis & Jones in full, it must be distributed between them, in proportion to their respective debts.

Decree reversed; and decree that it be distributed accordingly.

Cited by Counsel, 4 Wh. 149; 11 C. 318; 3 Wr. 331; 3 S. 296; 14 S. 192 9 N. 27, s. c. 8 W. N. C. 4.

Cited by the Court, 5 Wh. 306; 23 S. 364; 31 S. 457, s. c. 3 W. N. C. 107; 1 O. 499, s. c. 10 W. N. C. 201.

In 5 N. 306, it was decided that a library company which permitted the use

of its library (1) without charge, by all persons within the library building, (2) for a small charge, by all persons who desired to take out books, and (3) by members (who are stockholders) who paid annual dues and had control of the affairs of the company, is a public charity and exempt from taxation under the constitution of 1874.

[*160] *[PHILADELPHIA, FEBRUARY 14, 1835.]

Chew *against* the Commissioners of Southwark.

IN ERROR.

There can be no tenancy by the curtesy of a remainder or reversion vested in the wife, if the particular estate continue till the death of the wife. This doctrine applies as well to equitable as to legal estates; and therefore,

A mere naked seisin of the freehold by the wife, as trustee, will not support tenancy by the curtesy; though she has the beneficial interest in the reversion.

ERROR to the District Court of the city and county of *Philadelphia.*

The plaintiff claimed in this action as tenant by the curtesy, to recover certain rent charges.

The case was this:

On the 30th January, 1793, John Lawrence and wife, conveyed certain lots of ground to Ann Penn Allen, in trust for herself and her sisters Margaret and Mary Allen. Ann Penn Allen, conveyed on the 1st February, 1793, to Asa Copeland on ground rent, under whom the defendants claimed. The rent was reserved in common to herself and her two sisters Margaret and Mary. In 1793, Margaret intermarried with William Tilghman, and died in 1798, leaving one child Elizabeth Margaret Tilghman, and the said William Tilghman, her surviving.

1802, March 7, William Tilghman, executed a conveyance of the ground rents to Elizabeth Margaret Tilghman.

"To have and to hold the same to the said Elizabeth M. Tilghman, her heirs and assigns, to her and their own use and

behoof. In trust nevertheless, that the said Elizabeth, and her heirs and assigns shall permit and suffer the said William Tilghman, and his assigns, during the term of his life to enjoy, collect, and receive, for his and their own use, the hereby conveyed one undivided third part of all the rents aforesaid, until a partition of the said rents shall be made between the said Elizabeth M. Tilghman, and the other persons who held the said rents, undivided and in common with her; and after partition shall be made thereof as aforesaid, then in trust, that the said Elizabeth M. Tilghman, her heirs and assigns, shall permit and suffer the said William Tilghman, and his assigns, during the term of his life, to enjoy, collect, and receive, for his and their own use, that part of the said rents, which shall be assigned to the said Elizabeth M. Tilghman, in severalty for her proportion of the rents aforesaid, upon the partition aforesaid."

*1803, May 23. A partition was executed and the ground rent in question was allotted in severalty to [*161] Elizabeth Margaret Tilghman, who intermarried with Benjamin Chew, Jr., the present plaintiff, on the 11th July, 1816.

1817, June 17. Elizabeth Margaret Chew, died, leaving one child William Tilghman Chew, and her husband the said Benjamin Chew, Jr., her surviving.

1820, April 6. William Tilghman Chew, died.

1827, April 29. William Tilghman, died.

It was argued by *Chew* and *J. R. Ingersoll*, for the plaintiff in error, and by *Coxe* and *Chauncey*, for the defendants in error.

The opinion of the court was delivered by

KENNEDY, J.—The rent in question being of the nature of a rent charge, the plaintiff claims a right to receive it as tenant by the curtesy. That a husband under a concurrence of certain circumstances, may become tenant by the curtesy of such estate, cannot be questioned. Co. Lit. 29, a. These circumstances according to Littleton, sec. 35, and Lord Coke, Co. Lit. 30, a, are marriage, seisin of the wife, issue and death of

the wife. There seems to be no difficulty presented in this case, in regard to any of these things, except that of the seisin of the wife, or the husband in her right, during the coverture.

It is not necessary, however, I apprehend, to entitle a husband to claim by the curtesy in this state, that there should have been, what is considered in England an actual seisin of the wife or the husband during the coverture. It is sufficient if she were invested with the title to an estate of inheritance, and had seisin of the freehold thereof in law, by having a right to demand and receive the rent accruing from the enjoyment of it, either by a tenant at will, or for a term of years, if out on lease; or otherwise to demand and recover the immediate possession thereof: or as the late Mr. Justice Duncan expresses it in Stoolfoos *v.* Jenkins, 8 Serg. & Rawle, 175, "if there was a potential seisin or right of seisin." This doubtless would be sufficient, according to the rule, which has obtained under our intestate law, regulating the descent of real estate in Pennsylvania, to enable the surviving issue of the wife after the death of the same, to claim and have the estate as her heirs. Seisin in fact on the part of a parent during his life is not requisite, to entitle the issue of such parent after his death to claim the real estate to which the parent had a title in fee, as his heirs. Ownership without seisin, not only regulates the descent of real estate here, but likewise gives the right to dispose of the same, either by deed or will. This also seems to be the law of Connecticut, according to the cases of Bush *v.* Bradley, 4 Day, 298, and Kline *v.* Beebe, 6 Conn. Rep. 494, 499. But even in England, [*162] where the estate consists of a rent as in the present *case, an actual seisin, that is, a receipt of the rent by the wife or the husband, during the coverture, is not necessary to give the husband a right by the curtesy. If a present right existed to receive the rent, when and as soon as it should became payable, that as I conceive, would be sufficient. Co. Lit. 29, a; Perkins, sec. 469; Doctr. and Stud. 145; De Gray *v.* Richardson, 3 Atk. 471. The reason assigned for this in Co. Litt. 15, b, is "because there was no laches or default in

the husband, nor possibility to get seisin: the law in respect to the issue begotten by him, will give him an estate by the curtesy of England;" or as it is said in Shelley's Case, 1 Co. 97, "if the wife dies before the rent day, the husband shall be tenant by the curtesy, as it is agreed in 7 E. 3, 66, a, b, and 3 Hen. 7, 5, a, for by the act of God, it is impossible for him to have actual possession. But see Doctr. and Stud. 145; where it is said, "the old custom and maxim of the law is, that he shall be so:" and this perhaps is the better reason, as the right by curtesy is the mere creature of the law, and has no moral foundation for its existence. Banks *v.* Sutton, 2 P. Wms. 703. But still there must be a seisin of the freehold as well as a right to the inheritance on the part of the wife during the coverture; or what shall be deemed equivalent thereto, having regard to the nature of the estate. And hence a husband cannot be tenant by the curtesy of a reversion or remainder, expectant upon an estate for life, unless the latter be determined during the coverture. Co. Litt. 29, a; Perkins, 467. It is alleged, however, that in the case before us, there was a seisin of the freehold, attended by a right to the inheritance on the part of the wife during the coverture. But of what was she seized? and again, what kind of a seisin was it? At most, she had only a bare naked seisin in law of the freehold, without any beneficiary interest whatever; and though connected with a right to the reversion or remainder in fee, even of an incorporeal estate, it is not sufficient, as it appears to me, to give the husband a right to it by the curtesy. For instance, if the wife was a mere trustee in fee, holding for the use of another and his heirs, it cannot be pretended that the husband of the wife on her death in such case, could claim to be tenant of the estate by the curtesy. Gilb. on Uses and Trusts, 18, in note, by Sugden: because, even at the common law in early times, it would seem to be, that the *cestui que trust*, was considered as the owner of the land, and was sworn in assizes, and other inquests in pleas real and personal; and the feoffee to uses, was to make such conveyance or estate, as *cestui que use* directed, or he would have been guilty of a breach of trust. Litt. sec. 464; Hoole *v.* Sales, 2 Wils. 332,

and by Lord Hobart, an action would lie against him at law, to recover damages for the breach of trust; 1 Vern. 344, 419; Hoole *v.* Sales; though Chief Justice North, expressed a contrary opinion in Barnardiston *v.* Soam, Cobbett's State Trials, vol. 6, page 1098. But suppose it were otherwise at law, equity, where the *cestui que use* is considered the true and absolute owner of the estate, *would interpose and control the law in this respect. Finch *v.* The Earl of Winchelsea, 1 P. Wms. 278. And the trust estate is governed in equity by the same rules, and falls within the same reason as legal estates at law. Watts *v.* Ball, 1 P. Wms. 108. And accordingly, it has been settled by a series of decisions, that the husband shall be tenant by the curtesy of an equitable estate of inheritance, upon the same terms that he may be of a legal, of which his wife was seized during the coverture. Sweetapple *v.* Bindon, 2 Vern. 536; Watts *v.* Ball, 1 P. Wms. 108; Chapplin *v.* Chapplin, 3 P. Wms. 234; Casborne *v.* Scarfe, 1 Atk. 606; Morgan *v.* Morgan, 5 Madd. 248; Shoemaker *v.* Walker, 2 Serg. & Rawle, 554, 556.

[*163]

And as it is necessary in case of a legal estate that the wife should be seized of the freehold, as well as invested with the right to the inheritance, to entitle the husband to claim as tenant by the curtesy, so it is equally necessary in the case of an equitable estate, that she should be equitably seized of the freehold, as well as entitled to the inheritance. But a bare, naked seisin in law of the freehold for the use of a third person, is not regarded as a seisin in equity, which governs in cases of trust; because there the *cestui que trust* or use, is considered the true owner of the freehold, and the only person seized of it; and a wife in such a case, being the trustee, has no property or interest whatever in the freehold, and if not seized in fact, she can certainly have no seisin imputed to her in respect to ownership. Besides, without ownership on the part of the wife, it is obvious the husband can have no good claim by the curtesy, for his right in such case is a mere continuation of her right: and hence the writ *de partitione facienda* lies against the husband of a coparcener, who is tenant by the curtesy, because he continueth the estate of coparcenary. Co

Lit. 174, b; 175, a. And indeed the weight of authority is decidedly against the claim of the husband by the right of curtesy to the reversion in fee of the wife, expectant upon an estate for life which endured beyond her death, even where she might be said to have had an interest in the estate for life, by being in the receipt of a rent reserved on it to her and her heirs. In Keilway 104, b, it is said, that if a man take a wife seized of a reversion on a lease for life, whereupon a rent was reserved, he may be tenant by the curtesy of the rent, but not of the reversion. And Perkins, in sec. 467, makes a quere, whether he shall in such case have either the rent or the reversion by the curtesy. Mr. Hargrave notices this quere of Mr. Perkins in his note (7) to Co. Litt. 29, a, without expressing any opinion of his own upon it: but Mr. Greening, editor of the last edition of Perkins, gives it as his opinion, that the husband shall not be tenant by the curtesy of either the rent or the reversion. And this agrees with what Sir Edward Coke has laid down in regard to the right of the wife to dower out of the real estate of the husband after his decease; which having for its basis a moral as well as legal obligation on the part of the husband to *provide for his wife during her natural life, would seem therefore to be entitled to more favour [*164] both in law and equity than the right of curtesy. Banks *v.* Sutton, 2 P. Wms. 702–3. In Co. Litt. 32, a, Lord Coke says, "If the husband maketh a lease for life of certain lands, reserving a rent to him and his heirs, and he taketh a wife, and dieth, the wife shall not be endowed, neither of the reversion (albeit it is within the word tenement) because there was no seisin in deed or in law of the freehold, nor of the rent, because the husband had but a particular estate therein, and no fee simple. But if the husband makes a lease for years, reserving a rent, and takes a wife, and then dies, the wife shall be endowed of the third part of the reversion by metes and bounds, together with a third part of the rent." And so shall the husband, under the like circumstances in regard to the real estate of the wife, be entitled to the whole of the rent and the reversion during his life by the right of curtesy, where he had issue by her, capable of inheriting the estate;

Co. Litt. 29, b; Cary's Litt. 90–1; Guavarra's Case, cited in Manning's Case, 8 Co. 190 (Dub. 1793); because the possession of the lessee in such case is considered the possession of the lessor. Co. Litt. 15, a; Mr. Hargrave's note (3) to 29, b; Cary's Litt. 90–1; De Gray *v.* Richardson, 3 Atk. 171. Now the quotation from Lord Coke, relative to the seisin that is necessary to give a right to dower, and the nature of the estate out of which such right may or may not be claimed, is equally applicable as well as necessary to establish a right by the curtesy. And Lord Hardwicke accordingly in the case of Hearle *v.* Greenbank, 1 Ves. 307, laid it down in these words: "Though said to be determined in Casburn *v.* English, 1 Atk. 603, that husband may be tenant by the curtesy of a trust in equity; yet the wife must in the first place have the inheritance; and secondly, there must be a seisin of the freehold during the coverture." The same principle is repeated and confirmed by Chancellor Kent in his Commentaries, vol. 4, p. 31, (of the first edition,) who there states "the wife must have had a seisin of the freehold and inheritance *simul et semel* either at law or in equity during the coverture." But the seisin at law here mentioned must be understood as a seisin attended by or under a right of ownership; because in addition to what has been already advanced going to show that this must be so, the husband if entitled to the estate at all by the curtesy, has the right to it immediately upon the death of his wife, or it would not be, as has been already shown, a continuation of the estate or right of the wife; but if the wife was seized only in trust for the use of another, and not for her own benefit, at the time of her death, the husband cannot take, for Chief Baron Gilbert, in his treatise on Uses and Trusts, 171, lays it down that "tenant by the curtesy, or tenant in dower, cannot be seized to uses, because they come to these estates by the disposition of law, for the advancement and encouragement of matrimony; and those estates are given them *for their own maintenance, and are consequently exclusive of all other uses, for the advantage of other people." And besides, to permit the husband to take the estate for his own use on the death of his wife, where she was only seized of the

[*165]

freehold as a trustee, would be in direct violation of the trust and of the rights of the *cestui que trust*, which are paramount to that of either the wife or the husband, and therefore is not to be tolerated for a moment.

Now in the case under our consideration it is manifest that the wife of the plaintiff, during the whole of her coverture, was at most only a naked trustee of the freehold, and if seized at all, was seized of it as such trustee merely, without any beneficiary interest in it whatever; and being so, according to the principles which have been mentioned, and which seem to be well settled both at law and in equity, I do not see how it is possible for the plaintiff to recover. The case of Dethrick *v.* Bradburn, 2 Sidd. 110, so much relied on by his counsel, has very little if any resemblance to the present; for there the rent was granted in the first instance to the wife *dum sola* and her heirs for their only use; the payment of which, as in every grant of the kind, was to commence at a future day; only that it was postponed to a certain day next after the death of J. S., an event uncertain as to the day when it would happen, but still nothing more certain than that it would sooner or later take place, instead of fixing on a future day certain, without reference to an event that must happen, though uncertain as to the day when that would be; so that from the very commencement of the grant, which was of the time present in its terms, it was for the exclusive benefit and use of the wife and her heirs; there was no particular estate for life or of freehold carved out of it, to be enjoyed by any other person before it was to come to the use of the wife and her heirs, but the whole entire rent was granted immediately to her in fee; she may therefore be said in the words of the law *habere hæreditatem*, that is to have been seized of the freehold as well as the inheritance, so far as the nature of the estate would possibly admit of it. But in the case before us, the wife of the plaintiff had at most only a reversion or remainder in fee in the rent, expectant upon the determination of an equitable estate for life belonging to another person who out-lived her. It may also be observed that the case in Siderfin does not appear to have been decided by the court: it is only the opinion of Chief

Justice Glyn, that is given in favour of the husband's right to the rent as tenant by the curtesy, which however I am not disposed to controvert.

The judgment is affirmed.

Cited by Counsel, 7 W. 565; 8 W. & S. 119; 1 H. 261; 11 H. 238; 6 S. 470; 21 S. 481.

Cited by the Court, 4 Wr. 88.

Commented on and approved, 6 Barr, 429.

[*166] *[PHILADELPHIA, FEBRUARY 14, 1835.]

Perit and Another *against* Pittfield and Others, Assignees of Folwell.

Property placed by the debtor in the hands of the creditor, is not to be construed as having been received in full discharge of the debt, unless that plainly appears to have been the intention of the parties.

When therefore, F. had borrowed the note of the plaintiff, engaging to provide for it, if not paid out of funds shipped to Gibraltar, and afterwards borrowed from him another note, declaring in the receipt given for it, that he had indorsed a bill of lading for goods as a collateral, after which, the parties entered into an agreement under seal, which, after reciting that A. was desirous of securing to plaintiffs the full amount of their note, transfers to them coffee and other merchandise, expected to arrive from abroad, "to have and to hold for the payment of their debt," stipulating that whatever sum might remain in the hands of the plaintiffs, from the net proceeds of the coffee or other merchandise, after payment of the debt, should be returned to F. or his assigns, it was held, that this agreement constituted the assignee, not the sole but the qualified owner of the merchandise, transferring to him an interest in it only as a collateral security, that the relation of debtor and creditor still continued between the assignor and assignee, and that consequently, the assignee having sold the merchandise fairly on account of the assignor, and a loss having happened without his fault, no more of the debt to him was cancelled than the amount of money received by him from the estate of the vendee.

Nor is the debt discharged by a compromise, entered into by the plaintiffs with the vendee with the assent of the defendants, the assignees of F.

When more than one of several persons, liable to the payment of a note, have made voluntary assignments for the payment of their debts, the amount actually due on the note, at the times respectively, when dividends are declared, is to be taken as the sum on which the percentage is to be estimated.

[Perit and another *v.* Pittfield and others.]

THIS case was tried before Chief Justice Gibson, at Nisi Prius, and a verdict taken for the plaintiffs by agreement, subject to the opinion of the court in bank, as to the right of the plaintiffs to recover.

It was an action brought by the plaintiffs, to recover from the estate of John Folwell, in the hands of the defendants, as his assignees, the amount of certain dividends declared by the defendants under the assignment. The plaintiffs and Folwell were merchants in Philadelphia, and to explain the nature of their transactions, the plaintiffs first proved, that on the 19th of April, 1822, they advanced to Folwell, and for his accommodation, their promissory note for one thousand seven hundred and eighty six dollars and forty cents, for which he gave them a receipt, stating that he was "to account to them for it, and pay when due, or from funds shipped Horatio Sprague, Gibraltar." This accommodation note was renewed on the 2d of July, 1822, by another note, and a receipt given, by which Folwell agreed to provide for it.

On the 1st of August, 1822, the debt on which the present claim *arose, was incurred. The plaintiffs gave Folwell their promissory note at ninety days, and he de- [*167] livered to them a receipt in writing of the same date, stating, that he had "indorsed for it a bill of lading of goods, shipped Medora a collateral," until he paid said note, it being for his accommodation. On the 30th of October, 1822, Folwell and the plaintiffs executed the following instrument under seal.

"Whereas, I, John Folwell, of the city of Philadelphia, am indebted to Perit and Cabot, in the sum of one thousand dollars, which debt arises from their note to me, dated 1st of August. 1822, at ninety days' date, for the sum of one thousand dollars, which note I borrowed and received for my use and accommodation, which is discounted in the Bank of the United States. And whereas I am possessed of certain goods and merchandise, which have been consigned to David Correy & Co., of Port au Prince, in the island of Hayti, and whereas, by letter of the said David Correy & Co., dated, September 25th, 1822, they advise that they shall ship in

coffee, one thousand dollars or thereabouts, on board the schooner Good Friends, J. J. Whelen, master, to sail for Philadelphia about the 15th of October, the same being on account of sales of merchandise received. And whereas, I am desirous of securing to the said Perit and Cabot, the full amount of said note of one thousand dollars, which becomes due and payable on the 2d day of November next. Now these presents witness, that I hereby assign and set over to the said Perit and Cabot, whatever merchandise may be held by David Correy & Co., of Port au Prince, on my account, or the proceeds of any merchandise which I have consigned to the said Correy & Co., by the Good Friends, or any other vessel, or vessels, and the coffee or other merchandise, which they or their agents may have shipped on my account, on board the schooner Good Friends, or any other produce which they may have shipped by any vessel or vessels, to have and to hold for the payment of the said debt due to them of one thousand dollars. And I hereby agree to hand over to them the bills of lading of such property whenever they may be received by me. And it is hereby understood, and expressly agreed, that whatever sum or sums may remain in the hands of Perit and Cabot from the net proceeds of said coffee, or other merchandise, over and above the payment of the one thousand dollars, is to be returned to the said John Folwell or his assigns. Witness our hands and seals, this 30th day of October, 1822."

Folwell, on the 7th November, 1822, made a general assignment to the defendants, Pittfield and others, for the payment of his creditors, without preference, and without stipulating for a release. The coffee, consisting of forty-five bags, afterwards arrived by the schooner Good Friends, and was charged [*168] by the consignors Correy *& Co., in their account with Folwell, at one thousand and forty-eight dollars, including costs and charges. It was received by the plaintiffs, and sold by them on the 15th of November, 1822, for nine hundred and sixty dollars and ninety-six cents, to Robert Adams, a merchant in Philadelphia, taking his note for that amount payable at sixty days. It was admitted that Adams

[Perit and another *v.* Pittfield and others.]

was then in good credit, and that the sale was made in the usual course of business. In the plaintiffs' book of sales, it was headed: "sales of forty-five bags of coffee per schooner Good Friends, Whelen, from Port au Prince for account and risk of Mr. John Folwell." Before the note became due Adams failed, and it remained unpaid.

Folwell's assignees declared a dividend of twenty-five per cent. on the 16th of April, 1823. On the 25th of August, in the same year, Adams paid the plaintiffs a dividend of twenty per cent., on his note for nine hundred and sixty dollars, amounting to one hundred and ninety-two dollars and eighteen cents. On the 12th of April, 1825, the plaintiffs received from Adams another dividend of thirty per cent., amounting to two hundred and eighty-eight dollars and twenty-eight cents, in respect to which the following agreement and letters were in evidence.

"At a meeting of my creditors on the 6th inst. at the Merchant's Coffee-house, it was agreed that a compromise in the payment of my debts was advisable: and a resolution moved and carried, that thirty-three and a third per cent. should be received from me on the balance due, payable in my notes, at six, nine, twelve, fifteen, and eighteen months, indorsed by John Welsh. But, on further consideration, and with the advice of some of my creditors, I have thought out of my present estate, I may be able to pay thirty per cent. on the original amount of my debts that I have already paid twenty per cent. dividend on, making in all, fifty per cent. to my general creditors. And this I concur in, and now engage to make said payment as before mentioned, and when agreed to on the part of all my creditors, I will hand them over the new notes, and cancel the evidence of their claims they now hold against me.

"Robert Adams.

"I agree, 9th March, 1824."

John Welsh."

"We the creditors of Robert Adams, as aforesaid, do agree to his proposal of compromise, as above stated.

Signed (amongst others,)

Perit & Cabot."

[Perit and another *v.* Pittfield and others.]

On the 9th of September, 1824, the defendants addressed the following letter to Robert Adams:

"Dear Sir: If you are indebted to the estate of John Fol-
[*169] well, we *hereby agree to release you from the same, the debt being placed on the same footing with that of the other creditors.

ROBERT L. PITTFIELD,
JAMES SCHOTT,
SAMUEL SMITH,
Assignees of JOHN FOLWELL."

The defendants on the 20th December, 1824, declared another dividend upon Folwell's estate, of seven and a half per cent.

The plaintiffs further gave in evidence, the following letter from Robert Adams, to the plaintiffs' counsel, dated the 21st of December, 1831.

"Dear Sir: I received last evening your note of yesterday, and so well is my receipt book put away, that after the most diligent search, I am unable to lay my hands on it, nor can I imagine where it is, nor how it has got misplaced. The receipts were in the usual or common form, signed by Messrs. Perit & Cabot, I well recollect, without reference to anything; and so was the agreement between my creditors and myself, as to the compromise of fifty per cent. signed P. & C. But I well remember, that Mr. Perit, I think it was, remarked to me, that it was a business others were interested in, and they could only act (P. & C.,) with their concurrence. They mentioned Mr. Schott's name, and the impression on my mind is, they spoke of Mr. John Folwell's estate. I lament I cannot find the receipt book, and will still look for it.

ROBERT ADAMS."

Dunlap and *J. C. Biddle* for the plaintiff.

On the 7th of November it was plain that Folwell would not repay his note of one thousand dollars, and the plaintiffs were bound to sell the coffee to reimburse themselves.

They stood in the light of a factor, to whom the principal was

indebted, and held the coffee as a collateral security. A person borrowing an accommodation note, is debtor to the lender the moment he receives it, and obtains the money from bank. Pennsylvania Bank *v.* M'Calmont, 4 Rawle, 307. The question is, was the coffee given in payment of the note, or as collateral security. The evidence shows it to have been collateral. The receipt for the note speaks of it as collateral. If other property was substituted, it partook of the same character. The reserving the surplus interest of the proceeds, shows that Folwell still had an interest in it; it was to be sold for his benefit. Collateral security is only a pledge, it is not payment, unless so specially agreed. If a chose in action, is transferred by debtor to creditor, the presumption is that it was not in payment, unless the contrary be shown. Lees *v.* James, 10 Serg. & Rawle, 307. Even acceptance of a sealed agreement does not extinguish the debt, if taken as a collateral security. Charles *v. Scott, 1 Serg. & Rawle, 294; Roberts *v.* Gallaher, 2 Wash. C. C. R. 191. It [*170] is contended that the discharge of Adams by the plaintiffs, released the debt, but it cannot be denied, that before receiving the thirty per cent., they had the authority of Folwell's assignees to do so, who therefore, cannot now object to it as wrong.

Purdon, for the defendant.

This is an effort by plaintiffs, after having received property to the amount of their debt, and losing that property, to indemnify themselves. There is no equity in their claim. They had a preference beyond other creditors. They chose to take the risk of the property to pay their debts, rather than come in with the others. The assigned property was a payment in discharge of the debt. It was as much payment as money if agreed to be so taken.

The inquiry is, what on the face of the agreement under seal, was the intention of the parties. The general assignment is not used to give the plaintiffs a preference, but a special agreement is used to give the property. The recital and the *habendum* show that the property was intended to be

taken in full. There is no power of redemption reserved to Folwell.

The law of factor and principal, does not apply. The plaintiffs were not factors to sell the goods, having a lien for advances. It is merely the case of debtor and creditor, the creditor having a security in property that would command value immediately in the market. If the plaintiffs owned the coffee, they cannot charge the disbursements on it. Chipm. Cont. 73.

If the principal puts in the hands of the surety the means of payment, the taker becomes principal. Monroe *v.* Wallace, 2 Penn. Rep. 173. He further cited, 8 Serg. & Rawle, 458; 13 Serg. & Rawle, 159; Holmes *v.* D'Camp, 1 Johns. Rep. 34; Garlick *v.* James, 12 Johns. Rep. 146; 8 Mass. Rep. 150; Cortelyou *v.* Lansing, 2 Caines' Cases, 200.

He moreover argued, that the release of Adams by Perit & Cabot was a bar to this action. The evidence shows that they agreed to the compromise, the 9th of March, in their own capacity, and released in the same capacity. Folwell's assent was only conditional.

The opinion of the court was delivered by

SERGEANT, J.—Who after stating the facts, proceeded as follows: The defendants contend in the first place, that by the assignment of the 30th October, 1822, the property in the coffee was transferred to the plaintiffs, and received by them in full satisfaction and discharge of their debts from Folwell, so that the debt was extinguished. The sale of the coffee to [*171] Adams was on the plaintiffs' *own account and at their risk, and they have no claim to a dividend on the funds assigned by Folwell. But on considering the previous transactions between the parties, the tenor of the assignment itself, and the rights and obligations it created, it would seem that the property was transferred merely as a collateral security, and being disposed of fairly and in the course of business, and a loss incurred without the fault of the plaintiffs, the original debtor remained liable for the balance unpaid. The general principle is that property, placed by the debtor in the

hands of the creditor is not to be construed as received in full discharge of the debt, unless that plainly appears to have been the intention of the parties. In Charles *v.* Scott, 1 Serg. & Rawle, 296, certain engravings were placed in the hands of the defendant by agreement under seal. The late Chief Justice Tilghman says, "the justice of the case would require that the plaintiff should receive the amount of the debt and no more unless the contrary was the agreement of the parties; and the court, in a doubtful case, should construe the writing so as to produce justice." Leas *v.* James, 10 Serg. & Rawle, 314, is another case in which the question was, whether a bond assigned was received as absolute payment, or only as a collateral security; and the Chief Justice says, "in cases where a chose in action is assigned by the debtor to the creditor, I think the presumption is that it was not intended as an absolute payment unless it is so expressed. The reason of such presumption is, that such assignment is not, in its nature, a payment. It puts no money in the hands of the creditor, but only gives him the means of collecting money from another. If these means fail, therefore, without the fault of the creditor, there is no reason why the original debtor should be discharged."

In the present instance we find Folwell previously borrowing the plaintiff's note, engaging in confidential terms to provide for it if not paid out of funds shipped to Gibraltar. When this note of one thousand dollars was originally obtained, the security of goods by the Medora is expressly declared to be a collateral. The assignment of the 30th October was but a substitute, without any reason, so far as we can perceive, for changing the nature of the security. It is true a writing under seal was adopted in lieu of the loose receipt before employed. But Folwell's approaching general assignment, by which the control of his property would pass into the hands of strangers, might be thought to require a more formal arrangement than the slight evidence previously given, without presuming that any change was contemplated in its operation.

The assignment recites that Folwell was desirous of securing to Perit & Cabot the full amount of their note, and transfers

the property to them "to have and to hold for the payment of the debt." It comprehends, not as has been suggested, merely coffee, a specific article in possession, for the coffee had not then arrived; it is a general *transfer of merchandise [*172] consigned to Correy & Co., and its proceeds, and of coffee or other goods shipped by them; an executory contract; a chose in action. All this property was then distant or afloat; the bills of lading not come to hand, its quantity or value not ascertained; whether it exceeded the debt or fell short of it was uncertain. It is, therefore, not to be supposed, that either party could mean it to be satisfaction of the debt at all events. And it is sufficiently plain, from the latter part of the assignment, that Folwell still meant to retain an interest in the property transferred. It is there stipulated, that whatever sum may remain in the hands of Perit & Cabot from the net proceeds of the coffee or other merchandise, over and above the payment of the one thousand dollars, is to be returned to Folwell or his assigns. The plaintiffs were not to be the absolute owners; they were to account to Folwell or his assigns for any proceeds that might accrue beyond their debt. But how was the value of the merchandise to be fixed, so that the net proceeds could be ascertained? The parties obviously contemplated a sale for the purpose, and under this reservation the plaintiffs in fulfilment of the trust, they had undertaken, were not only authorized but bound to sell such merchandise in a reasonable time, and account to the principal for the proceeds. They could not treat the property as exclusively their own. They could not legally use it or destroy it. Folwell and his assigns had an interest in the result of a sale; they had a qualified property in all merchandise that arrived: and I see no reason why, if they had chosen, they might not, before sale, have tendered to the plaintiffs the amount due to them for their debts and charges, and demanded the coffee; and if the article were rising rapidly in price, it might have been their interest to do so. A view of the whole transaction presents the case of a transfer of an interest in general merchandise as a collateral security, settling with sufficient precision the respective rights of the parties, constituting the assignee, not the sole, but

the qualified owner, bound to sell the merchandise when received and account to the assignor for its proceeds. The relation of debtor and creditor still continued between them; and the assignee, having sold fairly, on the assignor's account, and a loss happening without his fault, the debt to him remains, and no more of it is cancelled than the amount of money received from the estate of the vendee.

It is further contended by the defendants, that even if the debt still subsisted, after the assignment of the 30th October, it was discharged by the compromise of the 9th March, 1824, made by the plaintiffs with Adams, by which they agreed to receive an additional thirty per cent., and release him from the residue. How far these acts, if done without the concurrence of the plaintiffs, would have the effect contended for, it is unnecessary to inquire, because there are other circumstances to be taken into view in deciding this case. The letter of Adams shows, that the plaintiffs at the time of agreeing *to the compromise, intimated that Folwell's assignees were interested, [*173] and that the plaintiffs could act only with their concurrence. It was perhaps, for that reason the notes which by that arrangement Adams was to deliver, were not delivered to the plaintiffs, but the thirty per cent. was paid to them in money in April, 1825, some time after the defendants had executed to Adams a release of the debt, so far as they were concerned in it. It would seem, therefore, that the arrangement of March, 1824, between the plaintiffs and Adams, was contingent, depending upon the assent of the defendants, and before it was carried into effect that assent was fully given. All parties probably considered it best to save something from the wreck of Adams' estate by coming in with his other creditors, and releasing, rather than risk the loss of the whole: and all deemed the assent of the defendants an indispensable preliminary to the completion of the compromise. It is doubtful whether it would have been completed by the plaintiffs without such assent. I look upon the receipt of the money by the plaintiffs in April, 1825, as authorized by the respective parties to this suit, and the defendants therefore, cannot now aver it to be a discharge of the estate of Folwell from liability for the difference remaining due on the note.

[Perit and another *v.* Pittfield and others.]

In relation to the sum on which the dividends claimed in this suit should be calculated, the rule has been recently laid down by this court in the case of the Bank of Pennsylvania *v.* M'Calmont, that when more than one of the persons liable to the payment of a note have made voluntary assignments for the payment of their debts, the amount actually due at the times respectively when the dividends are declared, is to be taken as the sum on which the percentage is to be estimated. This rule seems to apply to the dividends now sued for. Thus, on the 16th April, 1823, when Folwell's first dividend was declared, the debt, (with the charges incurred by the plaintiffs,) was one thousand and eighty-four dollars and sixty-three cents; deduct the twenty-five per cent. dividend then declared, two hundred and seventy-one dollars and fifteen cents, leaves eight hundred and thirteen dollars and forty-eight cents: on the 5th of August, 1823, Adams paid one hundred and ninety-two dollars and eighteen cents: this being deducted leaves six hundred and twenty-one dollars and thirty cents. Folwell's second dividend of the 28th December, 1824, seven and a half per cent. on this sum, forty-six dollars and fifty-nine cents, being deducted, leaves five hundred and seventy-four dollars and seventy-one cents. Adams paid a second dividend 12th April, 1825, which leaves two hundred and eighty-six dollars and forty-three cents, then due to the plaintiffs, without calculating interest on the dividends now claimed. This must be added from the time they were declared, and for that amount judgment be entered for the plaintiffs.

Judgment for plaintiffs

Cited by Counsel, 3 Wh. 606; 8 H. 198; 9 Wr. 155.

Cited by the Court, 4 W. & S. 546; 11 C. 482; 2 Pars. 145; 10 W. N. C. 316.

The last point, together with the case of the Bank *v.* M'Calmont, was overruled: 1 N. 114, s. c. 3 W. N. C. 82.

END OF DECEMBER TERM, 1834.

LAW DEPARTMENT. AUG 18 1898 R. OO. OF N.J.

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

EASTERN DISTRICT—MARCH TERM, 1835.

[PHILADELPHIA, MARCH 30, 1835.]

Kemmerer *against* Young.

IN ERROR.

When there is judgment on a writ of error that a plea demurred to is defective, and there is another plea, and the cause is remanded for trial on that plea, the case stands in the court below subject to the provisions of the act of 21st March, 1806, and the defendant may alter his defence on or before the trial as in other cases.

Semble, that a plea of submission and award to an action of debt on a bill obligatory, of all matters in variance between the parties, stating that the said writing obligatory, was then and there a matter in variance, without averring that the payment of the bill obligatory was a matter in variance, is sufficient.

THIS was a writ of error to the Common Pleas of *Northampton* county.

It was an action of debt brought by Young, the defendant in error, against the plaintiffs in error, administrators of John Kemmerer, on a bill obligatory, executed by Jacob Shook and John Kemmerer, the intestate of the plaintiffs in error, by which they bound themselves to pay to Young, two hundred

and thirty-two pounds and thirteen shillings, on the 12th day of June, next following the date of the instrument.

The defendant pleaded payment with leave, &c., and afterwards added a special plea of submission and award, to which the plaintiff demurred.

This cause was before the court on a former writ of error, [*176] when *judgment was entered on the plea demurred to, in favour of the plaintiff, and the record remanded that the cause might be tried on the other pleas. See the case of Young *v.* Shook, reported in 4 Rawle, p. 299.

The remittitur from the Supreme Court was received in the Common Pleas on the 2d of April, 1833. On the 2d of August, in the same year, the defendants filed an additional plea in the following words:

"And the said David Kemmerer and Nicholas Kemmerer, administrators as aforesaid, for further plea in this behalf, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, say:—That the said John Young ought not to have or maintain his aforesaid action thereof against them, because they say that after making the said writing obligatory, and before the commencement of this suit, after the death of the said John Kemmerer, deceased, that is to say on the 8th day of March, in the year of our Lord 1827, at the county of Northampton aforesaid, the said John Young and the said David Kemmerer, by the name of David Kemmerer, one of the executors, &c., of his father, J. K., in conjunction with a certain Jacob Shook, who was co-obligor with the aforesaid John Kemmerer, deceased, in the said writing obligatory submitted themselves and all matters in variance between the said parties, that is to say, by their certain submission, in writing, under their hands and seals, bearing date the day and year last aforesaid, to the arbitration, award, and final determination of Lewis Micke, Daniel Brown, and Adam Shuge, as referees, indifferently elected, named, and chosen by the said parties, that is to say, the said John Young, David Kemmerer, and Jacob Shook, to arbitrate, award, and settle of, and concerning all matters in variance

between the said parties, the said writing obligatory being then and there, that is to say, on the day and year last aforesaid, at the county aforesaid, a matter in variance and dispute between the said parties, to meet at the house of George Messinger, innkeeper, of Forks township, on the 17th day of March then instant. And the said David Kemmerer, and Nicholas Kemmerer, in fact further say, that the said referees afterwards, that is to say, on the said 17th day of March, in the year of our Lord 1827, took upon themselves the burden of the said arbitrament, and having met in due manner in pursuance thereof, and having heard the parties, their proofs and allegations, and examined the vouchers, and duly considered the matters submitted to them, that is to say, all matters in variance between the said parties, the variance and dispute between the said parties of, and concerning the said writing obligatory being part thereof, did make their award in writing under their hands, of and concerning the said matters so as aforesaid submitted *to them, and ready [*177] to be delivered to the said parties in difference, and did in and by their said award then and there, that is to say, on the 17th day of March, in the year of our Lord 1827, at the county aforesaid, award and find that the said John Young had no cause of action, and that the parties should pay the costs, each one-half, as in and by the said award bearing date the day and year last aforesaid, reference being thereunto had will more fully appear. And this the said David Kemmerer, and Nicholas Kemmerer, are ready to verify. Wherefore they pray judgment, if the said John Young ought to have or maintain his aforesaid action against them," &c.

This additional plea was stricken off by the court below on the 14th of October, 1833.

The cause came on for trial on the 27th January, 1834, when several exceptions were taken by the plaintiffs in error, to the decision of the court on points of evidence, which it is unnecessary here to notice, as the court confined their decision to the first error assigned, which was that the court below erred in their decision of the 14th October, 1833, striking off the additional plea.

Brooke for the plaintiff in error, shortly after commencing his argument, was stopped by the court, who called on *Ihrie* and *Scott*, of counsel for the defendant, to support the decision.

They argued that the plea offered was bad, because it stated a submission by one only of the administrators. Lawes. Ass. 660; Kyd on Awards, 387. The plea is also bad because it does not set out that the payment or factum of the bill was in controversy—only that the bill was in dispute. Suppose the dispute was trover for the bill—suppose an agreement for delay of payment, or that it was held by collateral security: a thousand cases might be put where there might be a contest about the bill and yet not on the payment or factum or validity of it.

In debt the judgment is *quod recuperet*. The order of this court was that the plaintiff should recover, *quoad* the plea of submission, and the trial should go on, on the other plea of payment. There is no instance of an amendment allowed after judgment in a court of error on a demurrer. Spackman *v.* Byers, 6 Serg. & Rawle, 385; Sweigart *v.* Lowmaster, 14 Serg. & Rawle, 202. If the party may amend once, he may forever. 2 Tidd, 685.

The opinion of the court was delivered by

SERGEANT, J.—By the act of the 21st of March, 1806, sec. 6, "the defendant may alter his plea or defence on or before the trial of the cause." As this cause was open for trial when the additional plea was filed, it fell within the words of the act of assembly. The court below supposed they were restricted by the former judgment of this court, reversing the first judgment, [*178] and remanding the cause, with *instructions to proceed to the trial of the issue in fact. The judgment of this court did not divest any right the parties might otherwise possess after the cause was remanded. No decision took place here on the right of the defendants to add a new plea; nor was the judgment for the plaintiff in error a final judgment *quod recuperet*, but merely on the demurrer, that the plea was not sufficient in law, and that the cause should go back for trial on the other issue. Under these circumstances the de-

fendants retained the right given them by the act of assembly, to add a plea before the trial of that issue. If it were not so, they would be without an opportunity to remedy their defective pleadings, and the merits would be sacrificed to form. For in the court below, the judgment on the plaintiff's demurrer to the plea of the defendants was in favour of the defendants, and they could not then be expected to apply for leave to add a better plea. They had not, it would seem, even the usual opportunity of withdrawing a plea demurred to before judgment on the demurrer; because the objection to the plea which ultimately prevailed, was not made in the court below either by way of special demurrer, or on the argument as a ground of general demurrer. The defect in the plea was suggested when the case came up to this court by writ of error. Nor could the defendants alter their pleading here. Such is not the practice. This court adjudicates on what is before it, and sometimes remands with instructions, but does not undertake to mould the pleadings preparatory to a trial below. In Spackman *v.* Byers, 6 Serg. & Rawle, 385, even a release of damages beyond the amount in the narr. was not allowed, but the plaintiff was permitted to take down the record, that the court below might allow the amendment if they thought proper. In the present case, the record went back of course when the plea was overruled.

In some instances, a judgment on a writ of error that a plea demurred to is defective, is final. But when there is another plea, and the cause is remanded for trial on that plea, the case stands in the court below subject to the provisions of the act of assembly, and the defendant may alter his defence on or before the trial, as in other cases. To be sure, a plea overruled by this court is not to be put in again. But a new and different plea is admissible.

The new plea, however, is itself objected to as defective, in not stating that the question of the payment of the bond on which this suit is brought, was a matter in variance. I am inclined to think the averments in it sufficient. See 4 Rawle, 304. All that is required in a plea in bar is certainty to a common intent. But this it is admitted was not the ground

on which the court below struck off the plea; and I feel averse to entertain objections started for the first time in this court, when the party has had the opportunity to make them below, and has not done so. Great injustice may be done by it. If the court below erred in the grounds on which they decided, the defendants ought to be restored to the position they [*179] *have lost, and the pleadings may be then adjusted so as to reach the merits.

Judgment reversed, and *venire facias de novo* awarded.

[PHILADELPHIA, MARCH 30, 1835.]

Beckman and Johnson *against* Shouse *et al.*

IN ERROR.

The proprietors of a stage coach were in the practice of carrying for hire parcels of merchandise for persons generally: the parcel being entered in the way-bill.

Held, 1. That they were common carriers.

2. That they were not protected from responsibility for the loss of a parcel of goods, by an advertisement "all baggage at the risk of the owner;" the word baggage, not including merchandise generally.

In the absence of all proof of the manner of loss, the defendants would be liable as ordinary bailees for hire. Per Rogers, J.

IN the Court of Common Pleas of *Northampton* county, from which the cause was removed to this court by writ of error, this was an action of *assumpsit* instituted by the plaintiffs in error, against the defendants, as common carriers, for not delivering a parcel of the value of fifty-five dollars and eight cents, which the defendants, for hire paid, undertook to carry from Easton, Pennsylvania, to the city of New York.

Upon the trial of the cause, the facts were these. The defendants were proprietors of a line of coaches running between Easton and Elizabethtown, N. J., from whence, by means of boats, the line was continued to the city of New York. They proposed to carry passengers and their baggage to and from Easton and New York; and it was proved that they were accustomed to carry packages and parcels of various descriptions.

[Beckman and Johnson *v.* Shouse *et al.*]

The plaintiffs were merchants, residing in the city of New York. In the month of August, 1829, they sent, by the defendants' line to Messrs. Hummell & Troxsell, at Easton, a box of dry goods, with permission to return any portion of the contents that might not suit them. The box was delivered to Hummell & Troxsell, who, upon opening it, found one piece of Gros de Naples silk and two pieces chintz, that were deemed too expensive for the Easton market. These articles were baled and the parcel directed, with the kind of paint generally used for such purposes, to Beckman & Johnson, New York. Hummell contracted with Samuel *Shouse, one of the defendants, and the agent for the line at Easton, to [*180] convey the parcel to New York for an amount of hire which was paid. Shouse entered the parcel on the way-bill. At this time an allusion was made to the manner in which the package was marked: when Shouse took it, some of the paint adhered to his fingers, and he remarked, that it would all be rubbed off before the package arrived in New York; but did not on that account object to receiving it. A few days afterwards a letter from Beckman & Johnson was received by Hummell & Troxsell, informing them that the parcel had not come to hand; which, being communicated to Shouse, he replied that he had been careful to see the package put aboard the stage, and requested that inquiry concerning it might be made by Beckman & Johnson, at a new office of the line in New York; which was done, but no information obtained. Shouse, on being told of this, said he did not know what to think about it —that the package must be in New York, and soon afterwards advertised the loss of it. The parcel was not at any time delivered to Beckman & Johnson, and the defendants refusing to make compensation for the loss of it, this action was instituted.

George Barnet, a witness produced by the defendant, testified, that at the time when the package was forwarded he was principal agent for the line at New York, at which place there were two offices. To one of the offices he attended particularly; to the other occasionally. That he sometimes received the fare from New York to Easton, and out of it, he paid to

the captain of the boat the fare to Elizabethtown. He then entered on the way-bill the fare from Elizabethtown to Easton only. Sometimes passengers preferred paying to the captain the boat fare from New York to Elizabethtown, and to the witness the fare from Elizabethtown to Easton. That during his agency, with a few exceptions, he went every day in the boat to Elizabethtown: that usually he made out the way-bills in New York, but never closed them till he arrived at Elizabethtown. That the box for Beckman & Johnson, directed to Hummell & Troxsell, was delivered to him in New York, and by him sent from thence in the line. The captain of the boat frequently demanded from the witness payment for the carriage of packages, but was never paid anything: that the witness received payment for the carriage of them from New York to Easton; but entered them on the way-bill from Elizabethtown only; and that the line was in the habit of carrying for him packages not belonging to passengers on board. That he always entered them on the way-bill and charged for their carriage what he thought just and right; that he was not at Elizabethtown when the stage arrived there by which the package from Hummell & Troxsell was sent; and that he had not at any time, seen a package of that description at either of the offices in New York.

[*181] *Having been called a second time, it was proposed to prove by the witness, that he had received from one of the defendants a copy of a handbill stating in the usual style the route, fare, advantages, &c., of the line, to which was appended this notice, "all baggage at the risk of the owners," —that he had others like it printed, and posted in all the public houses at New York; and that he sent some of them to Easton. To the admission of which evidence the plaintiffs' counsel objected, but the court overruled the objection: the plaintiffs' counsel excepted, and the court sealed a bill of exceptions.

Three of the said handbills were then offered in evidence; the plaintiffs' counsel objected to their admission, but the court overruled the objection and sealed a second bill of exceptions.

[Beckman and Johnson *v.* Shouse *et al.*]

The defendants then offered to prove by William Shouse and other persons conversant with the subject, 1st. The general understanding of the term "baggage" as used in the handbills given in evidence. 2d. That the notice, "all baggage at the risk of the owners," is appended to all advertisements of this description, and expressed in the phraseology used in the present instance. To the admission of which evidence, the plaintiffs' counsel objected, on the grounds of its irrelevancy and illegality. The court overruled the objection so far as it regarded the first branch of the proposition, and sustained it as to the second. To which decision of the court an exception was taken by the plaintiffs' counsel, and the court sealed a third bill of exceptions.

Under this decision the following evidence was given:

William Shouse testified that he had been engaged in running stages for five or six years to a considerable extent That he had never conversed with any other persons than stage proprietors about the meaning of the term "baggage." All that is carried in the boot of the stage is described as baggage, and so called in travelling all over the union. It is a common expression that there is more baggage than will go in the boot. If an Irishman was put in the boot he would be called baggage.

William White testified that he had been engaged in staging fifteen or eighteen years. When the office is full of trunks, boxes, bales, and parcels to go by the stage, we call it all baggage, and so does everybody else that he heard talk about it. Bandboxes and everything that is put into the stage is called baggage. It is generally so called by the public.

Hummell, who was produced as a witness and testified on behalf of the plaintiffs, on his cross-examination stated that he could read: that he had seen handbills similar to those given in evidence, but did not recollect ever to have read them.

The evidence having been closed, the defendants' counsel requested the court to charge the jury:—

First. That this action cannot be maintained by the present

[*182] *plaintiff, with whom the defendant made no contract. If any action could be maintained, it should be in the name of William Hummell, who made the alleged contract, if any were made, with Samuel Shouse, and paid the freight of the goods, and in whom alone a right of action against the defendants could rest.

Second. That if the defendants were common carriers only of passengers, and of baggage or parcels belonging to passengers, they would not, on that ground, be liable as common carriers of merchandise, under other circumstances.

Third. That if the jury believed that the defendants did not agree to carry the goods in question to New York, but that their concern with the line of stages ceased at Elizabethtown Point, the plaintiff could not recover in this action.

Fourth. That the defendants were not bound to deliver the goods in question, to the plaintiffs' store; and it is incumbent on plaintiff to show clearly, that they made every reasonable search and inquiry, both at New York and Elizabethtown, for the goods, or they cannot recover.

Fifth. That if public notice were given by the defendants to all persons, that they would not be answerable for articles transported in their stages, of which William Hummell had notice, or the means of knowledge, the plaintiffs cannot recover.

Sixth. That if the jury believe, that the custom of the country is, that stage owners and proprietors are not liable for loss, in the transportation of articles sent in their stages, the plaintiffs cannot recover.

Seventh. That if the jury believe that the parcel in question was so badly marked by William Hummell, as to be lost in consequence, the plaintiff cannot recover.

After stating the evidence, and the law generally, as applicable to the case, the court gave in charge to the jury, in answer to the first point propounded by the counsel of the defendants: That if the jury should find from the testimony, that the right of property to the goods in question, was never out of the plaintiffs, and that they were sent by the plaintiffs to Hummell & Troxell, by the same line of stages, and to be

returned if they did not suit, and that they were repacked by Hummell & Troxell, and taken by Hummell to the house of Samuel Shouse, to be sent back to New York, and were delivered to Mr. Shouse for that purpose, the suit was well brought in the names of the present plaintiffs.

To the second point, the court answered, that if the defendants were common carriers of persons, and of the baggage belonging to passengers, they would not on that account, be liable, as common carriers of merchandise under other circumstances. A stage-coach for the conveyance of persons, is not, of course, a conveyance for goods and merchandise: a continued practice, however, by the owners of *a stage-coach, of receiving parcels and packages for carriage, [*183] and of carrying them for hire, will make them common carriers.

To the third point, the court answered for the defendants. The facts were, however, for the jury; and if they found them as supposed by defendants' counsel, the plaintiff could not recover, because the contract proved would be different from the one set out in the declaration.

To the fourth point. The court answered that the defendants were not bound as carriers, without a special contract for that purpose, or a special custom proved to do so, to deliver the goods in question at the store of the plaintiff. They were bound to deliver them at the termination of the line, and at the usual place of deposit for the stage line, where they would be safe; and at that place, and at that place only, it was the duty of the plaintiff to call for them.

In answer to the fifth point, the court charged that if the jury should find that the defendants were in the habit of receiving and carrying for hire, baggage, luggage, parcels, or packages, by whatever name they might be called, then they were common carriers, and liable, at all events, for all losses not occasioned by the act of God, or the common enemy. Their liability, however, as common carriers, might be restricted by special contract, or limited and restrained by notice given to those persons who employ them; and if notice should be found by the jury, that notice should be considered as part

of the contract between the parties. Notice to the agent is, in point of law, notice to the principal: but whether the plaintiffs or their agent had notice, was a question of fact for the jury. The publication of notice in the newspapers, or the setting up handbills in the stage office, is not sufficient ground for a legal presumption of notice; but the circulation of handbills, the setting them up in the stage office where the baggage or packages are received or delivered, the size of the character in which they were printed, the situation in which they were placed,—whether conspicuous or not,—evidence that the party saw them, or could not fail to see them without gross neglect, as well as evidence that the party could read,—are facts and circumstances to be submitted to a jury, and from which they must decide whether notice was given or not. If the party had ample means of knowledge, the jury would be authorized in finding notice. But under any notice fully proved, the carrier would be liable, if the loss of the goods was occasioned by his own gross carelessness, fraud, or misconduct; for the law will not permit him, by notice, to free himself from the obligations of honesty and good faith, nor, from the exercise of ordinary care. Even with notice, stage proprietors, and carriers of goods, would be liable for an injury or loss arising from the insufficiency of coaches, harness, or tackling, from the drunkenness, ignorance, or carelessness of drivers,—from vicious and unmanageable horses,—or when occasioned by [*184] *overloading the coaches; as these would all imply negligence or want of care.

The court charged in reference to the position of the counsel of the plaintiffs, that the alleged notice if brought home to them, did not apply to the facts in this case, but was to be confined to baggage accompanied by the owner who is a passenger in the stage; that the word baggage had not received a judicial construction, or a fixed legal meaning in this state. Usage and custom ascertain and fix the meaning of words in the country; and in this case, considering the meaning of the word, baggage, doubtful, the court admitted parol evidence to show the sense in which the word is used, and how it is understood as applicable to this cause; and they submitted to the

jury to ascertain the meaning of the word baggage, as contained in the handbills, aided by the parol evidence upon that subject, and the definitions read from the dictionaries, from all which they would determine whether the word baggage, as used in this case, was understood as extending to packages sent by the stage, as well as to those accompanying the owner. If it was confined to the luggage of travellers, it would not restrain the general liability of the defendants, as common carriers, in the present suit. If it included packages or parcels sent without the owner, and if such was the sense in which the word is generally used and understood, it should be regarded as entering into the contract in this case, provided they found notice thereof to the plaintiffs, and it would limit the liability of the defendants to losses occasioned by negligence or want of care.

To the sixth point, the court stated that the liability of stage owners and proprietors was matter of law, if the jury found that they had become common carriers, by carrying for hire, and they were liable for all losses not occasioned by the act of God, or the public enemy, unless that liability was limited by special contract or by notice.

The seventh point was answered for the defendants. To which opinion of the court, the counsel of the plaintiff excepted.

The following errors were assigned in this court.

1. The admission of the evidence contained in plaintiffs' first bill of exceptions.

2. The admission of the evidence contained in plaintiffs' second bill of exceptions.

3. The admission of the evidence contained in the third bill of exceptions.

4. The answer of the court to the third point propounded is not sufficiently clear, as there was no evidence of their concern with the line ceasing at Elizabethtown Point. The manner in which this subject was left to the jury, was calculated to mislead them.

5. The answer to the fourth point is erroneous, and should have been a negative of the proposition.

[*185] *6. That the charge in relation to the fifth point, and the matters connected therewith, is erroneous.

7. The court did not answer the sixth point correctly.

8. The court erred in answering the seventh point.

9. That on the facts in evidence the court should have charged the jury, that the plaintiffs were entitled to recover.

C. W. Brooke, for the plaintiffs in error, considered first the general questions arising out of the charge of the court on the fifth point, and forming the sixth error assigned.

That the defendants were common carriers was clear from 2 Show. 128; Salk. 282, pl. 11; 1 Pick. 56; 1 Bay, 99. But the extent to which their exemption from liability by notice was carried by the court below could not be supported in Pennsylvania. The common law doctrine of common carriers as understood in the reign of Hen. 8, and previously to that period corresponded with the general principles of bailment. The carrier was liable only where he had not used ordinary care and diligence.

He then went into an historical view of the law of common carriers, and cited Coggs *v.* Bernard, 2 Ld. Raym. 909, 918; 2 Com. on Cont. 291; 4 Rob. R. 348, 352, cited in Story on Bailm. 319; Jones on Bailm. 103; Gordon *v.* Little, 8 Serg. & Rawle, 535, 551, 557; Riley *v.* Horne, 5 Bingh. 217.

The modification of their liability by notices is an innovation in the common law, which has been deeply regretted by some of the most learned judges in England. Lord Ellenborough in Nicholson *v.* Willan, 5 East, 513, one of the strongest cases in favour of the notice, assigns as reasons for his decision, the long duration and universality of the practice, and the sanction which the custom had received from parliament—while he admits it to be against the policy of the law, and liable to much abuse and inconvenience. In the whole range of the English authorities there cannot be found a decision establishing the validity of a notice like that in the present case. But to whatever extent this exemption by notice may have been carried in the English courts, the subject may be considered as *res integra* in Pennsylvania. Our courts will doubtless be cautious not to relax the

wise and wholesome doctrines of the common law in relation to carriers, nor is it improper to allude to the vast extension of our commerce through our numerous and daily increasing lines of internal improvement as furnishing a reason for strict adherence to the rule of the common law.

If then the notice was nugatory, it follows necessarily that evidence of the publication and circulation of the handbills and of their contents was irrelevant and ought not to have been received. But granting the notice to be valid, was it brought home to the plaintiffs? If it be obligatory, it is on the ground of its being a part of the contract, like a usage of trade, and it is well settled that a *usage different from [*186] the common law must be strictly proved by the party alleging its existence. Gordon *v.* Little, 8 Serg. & Rawle, 553. It must be traced conclusively to the knowledge of the plaintiffs. 2 Stark. 56, 280; 3 Bingh. 2; 2 Camp. 412; Story on Bailm. 357. Here Hummell swears that he did not read the handbill.

Again, conceding the notice to be brought home to the plaintiffs, it cannot in this instance protect the carriers. The term "baggage" contained in the notice does not embrace a package of goods like that in question.

It is a specific and not a general term which can with no propriety be applied to a package like the one in the present case. The terms of the notice should be clear and explicit. If there is any ambiguity, it will be taken most strictly against the carrier. Holt, 317; 2 Camp. 108; Jeremy's Law of Car. 45, note. This point has been expressly decided in Massachusetts, in Dwight *v.* Brewster, 1 Pick. 54.

The court erred in directing the jury that the defendants were not bound without a special contract or a special custom to that effect, to deliver the goods at the store of the plaintiffs; that they were bound to deliver them at the termination of the line, and at the usual place of deposit, only, where it was the duty of the plaintiffs to call for them. The rule is, that carriers are bound to deliver the goods according to the directions given. 2 Shower, 327, 81, 129; 2 W. Bl. 916; 3 T. R. 399; 3 Esp. Ca. 127; 3 B. & B. 177; s. c. 6 Moore, 469; 4

Price, 34. The court charged that the proof of the custom rested on the plaintiffs. The authorities show that the burden of proof is with the carrier; and in all those cases where the carrier is discharged by making a delivery at a place different from the direction, or short of the place of ultimate destination, it is his duty to give notice to the consignee of the arrival of the goods. 2 Bl. 916; Golding *v.* Manning, 3 Wils. 429, 433.

Again, it is conceived that the court erred in instructing the jury that if they believed the parcel in question was so badly marked by Hummell, as to be lost in consequence, the plaintiffs could not recover. Now it is nowhere laid down that it is necessary that the package should be marked. It is not essential to the carrier's liability. A strong analogous case is to be found in 2 Stark. 323, in which it is held that if the loss arises from the defect of packing, which is not apparent, the carrier will not be liable. But if the manner of packing is apparent, the carrier by accepting them seems to undertake to carry them safely in the manner they are packed, and consequently will be liable.

Jones and *R. M. Brooke, contra,* urged that the defendants were not common carriers of merchandise. Their employment was the transportation of the mail and of passengers, not of goods. A common carrier having convenience cannot refuse [*187] to take goods, *B. N. P. 70, any more than an innkeeper having convenience can turn off a guest. So a stage proprietor who occupies a public route cannot refuse to take passengers. But will it be contended that it is actionable in him to refuse to carry a parcel of merchandise? Certainly not. His undertaking is to carry passengers, not parcels. In all cases where the stage proprietor has been held liable for parcels, it has been on the special contract and not on the general assumpsit of a common carrier. No matter what may be the precise quality of the common law liability, it cannot affect or vary the special contract. If this proposition be correct, then the plaintiffs must fail; because the evidence clearly shows that the special contract in this case was made not with

them, but with Hummell, and there is no pretence for saying that he was their agent. The action ought therefore to have been brought in the name of Hummell. The party having the legal interest in the contract must sue. 1 Ch. Pl. 3–4; and the right of property makes no difference.

But if the defendants are to be viewed as common carriers, they are absolved from responsibility by the terms of their notice. There is no strict technical meaning affixed to the term "baggage." It derives its force and extent from common usage and common parlance. These are therefore to be consulted in order to ascertain its import; and the testimony in the present case shows that it would cover the parcel in question. They further contended that the *terminus* here was at Elizabethtown and not at New York, and that consequently there was a variance between the declaration and the proof. They cited Story on Bailm. 353, 354, 357; Gibbon *v.* Paynton, 4 Burr. 2298; Clarke *v.* Grey, 4 Esp. N. P. C. 107; Boyce *v.* Anderson, 2 Peters, 150; Story on Bailm. 322; and as to showing the usage in order to explain the meaning of the word "baggage," 2 Stark. Ev. 454; 3 Ib. 1033; 2 Phillips on Ins. 22.

Porter replied.

The opinion of the court was delivered by

Rogers, J.—This is an action of *assumpsit*, against the defendants as common carriers, for the loss of a parcel, containing one piece of silk, and two pieces of chintz, which the defendants, proprietors of the New York line of coaches, received in Easton, and undertook, but failed to deliver, at New York. The plaintiffs proved the delivery of the parcel to the defendants, and an undertaking, on their part for a certain stipulated sum, to deliver it at New York. The defendants contend that they were not common carriers, and if they were, their responsibility was limited.

That the defendants were common carriers, and liable as such, cannot, I think, admit of question. A common carrier has been defined to be one who undertakes for hire and reward

to transport goods of such as choose to employ him from place
[*188] to place; and *they are generally of two descriptions, carriers by land and carriers by water. It is unnecessary to say anything of the latter description, but the former are the proprietors of stage wagons and stage coaches, &c., which ply between different places, and carry passengers and goods for hire. In addition to the regular business of the company, the defendants were in the continued practice of transporting parcels and packages at a liberal compensation, whenever offered, the parcel being marked on the way-bill, so as to direct the attention of the agents along the line to it, with a view to its security and safety. It is true, that it is not every person who undertakes to carry goods for hire that is a common carrier. A private person may contract with another for the carriage of his goods, and incur no responsibility beyond that of any ordinary bailee for hire, that is to say, the responsibility of ordinary diligence. But here the defendants pursued the business as a public employment, and undertook to carry goods for persons generally. They held themselves out, as ready to engage in the transportation of goods for hire, as a business, and not as a mere casual occupation, *pro hac vice*. This, at least, is the fair import of the testimony. If the defendants were common carriers of persons, and of the baggage belonging to passengers, they would not on that account be liable as common carriers of merchandise. A stage coach for the conveyance of persons, is not of course a conveyance for goods; but a continual practice, such as has been proved by the owners of a stage coach, of receiving parcels and packages for carriage, and of carrying them, for hire, will make them common carriers.

If the defendants stand in this relation, they are liable for all losses not occasioned by the act of God, or the common enemy, unless the responsibility which the law casts upon them, is limited by special contract or by notice, brought home to the plaintiffs or their agent; and this brings me to the second and most material part of the case. The principal business of the defendants consists as appears from advertisements, in the carriage of passengers in which is necessarily included

the baggage intended for the personal convenience of the traveller. The advertisements are "cheap travelling;" cheap travelling, in which the rate for passengers, but not for parcels, is stated, and to this is appended, a N. B., "all baggage at the risk of the owner." It is insisted that the N. B. limits the responsibility of the carrier, not only as regards baggage, strictly so called under the eye and supervision of the owner, but that it includes also goods and merchandise of whatever description, even when placed under the exclusive care and superintendence of the carrier. This is a doctrine to which we cannot accede. If the defendants wished to be so understood, it is certainly not unreasonable to require something more explicit than that which is contained in the handbills on which they rely. The meaning of the word baggage, taken in consideration with the advertisement, is the effects of a traveller, *and this [*189] signification has been attached to it in a case very like the present, decided by the Supreme Court of Massachusetts. Dwight & al. *v.* Brewster, 1 Pick. 50. In the case cited it is ruled that the practice of conveying for hire in a stage coach parcels not belonging to passengers, constitutes the proprietors of the coach common carriers: and that in an advertisement stating the route, fare, &c., the clause, "all baggage at the risk of the owners," did not apply to such parcels. It manifestly applies to the baggage of passengers, it being in the same advertisement, which states the route, the fare, &c. The clause was intended to guard the proprietors from liability in case the trunks, &c., were stolen, without any fault on the part of the owner of the stage or their agents.

It was formerly a question of much doubt, how far common carriers, on land, could by contract limit their responsibility. But that they have the power seems now to be settled, although, many learned judges have expressed some regret that the validity of notices restricting their liability, was ever recognized. But although this must now be admitted, yet, they cannot by any special notice, or agreement free themselves from all responsibility, particularly where there is gross negligence or fraud, nor in a case like this from the exercise of ordinary care. When a common carrier claims an exemption from the

responsibility, which the rule of law casts upon him, on the plea of special notice, it is not affording him a hard measure of justice, to require that not only the notice should be brought home to the employer, but also that the terms of the notice should be clear and explicit, and not liable to the charge of ambiguity or doubt. But on the supposition that the defendants are not common carriers, but ordinary bailees for hire, the cause may be viewed in another aspect. The defendants undertook for a certain sum, to transport the parcel to New York, and this as already stated, they have failed to do. It is surely then necessary for them to show why they have not performed the contract. In the absence of all proof of loss, they lay themselves open to the imputation, that the property is still in their possession, or in the possession of their agents, or has been embezzled by them. And in either case, it is clear that they are liable to the plaintiffs. I have looked through the testimony for some account of these goods. All we know, is that they were received by the defendant's agent, who undertook to convey them to New York, and for some reason, they never reached their place of destination. Less than positive proof would suffice, but some account should be given, from which the jury would be warranted to infer, that the goods had been either discharged, or had been lost by accident, or had gone into other hands, than the defendant's or his agents. Here the parcel was booked and put on the way-bill, and if mislaid, there must have been some negligence on the part of some of the agents along the line. If the parcel did not arrive at a particular point, it was the duty of the agent, to make inquiry, and [*190] *ascertain the reason it had not arrived; and if this had been done, we should not now be in doubt, whether the package had been mislaid, or embezzled, and possibly we would then have known, when and where, and how the loss had occurred. It is true, that where a loss has been proved, ordinary care in the carrier is presumed, and the *onus* is thrown upon the plaintiff, but all a plaintiff has to do, in the first instance, is to prove the contract, and the delivery of goods, and this throws the burden of proof, that the goods were lost on the carrier. And this is a salutary principle, for otherwise,

owners and employers, would be at the mercy of bailees, who would rely on a failure to perform the contract, as a complete indemnity against the suit of the bailors. I cannot see how, in the absence of any proof, as to the manner the loss occurred, the plaintiffs can do more than to rely on the fact of the non-delivery of the goods, as evidence of want of ordinary care, on the part of the carriers, or their agents.

Since the above remarks were written, the case of Beardslee *v.* Richardson, 11 Wend. 25, has been put into my hands, in which the same opinion is intimated. It was the case of a sealed package of the value of one hundred dollars, which the defendant as bailee, without reward, undertook to deliver. It was held that the defendant was liable for gross neglect only; and whether he was guilty of any neglect, did not sufficiently appear, from the testimony. That it did not appear that any demand was made or application of any kind, until the suit was brought. That the plaintiff was bound to show that the money was lost by the defendant's negligence, or could not be obtained on request. On this ground, and because the suit was for money had and received, the plaintiff failed in his action. But says Chief Justice Savage, "had he shown a demand and refusal, the defendant, I think, would have been bound to account for the loss, and to indemnify the plaintiffs, unless he could show the property lost, without fault on his part, that is, without gross negligence."

With the exception of the principles above indicated, we concur with the judgment of the Court of Common Pleas.

Judgment reversed, and a *venire de novo* awarded.

Cited by Counsel, 6 Wh. 444; 9 W. 88, 440; 1 W. & S. 286; 8 W. & S. 371; 11 H. 528; 1 C. 122; 6 C. 245; 8 C. 415; 2 S. 384; 12 S. 53, 86; 17 S. 213, 505; 18 S. 277; 19 S. 376, 400, 401; 29 S. 375; 5 N. 228; 11 W. N. C. 74.

Cited by the Court, 6 W. & S. 422, 500; 8 W. & S. 49; 4 H. 77; 6 H. 43; 8 C. 213; 9 Wr. 215; 1 S. 329; 5 S. 61.

[*191] *[PHILADELPHIA, MARCH 31, 1835.]

Case of Austin and Others.

An attorney-at-law holds his office during good behaviour, and is not professionally answerable for a scrutiny into the official conduct of the judges, which would not expose him to legal animadversion as a citizen.

An assertion contained in a letter expressed in respectful language and addressed to a President Judge, by attorneys practising in his court, that the court had lost the confidence of the public and the suggestion of his retirement as the means of restoring it, do not affect the course of the judge's public duty, and cannot be deemed a breach of professional fidelity on the part of the attorneys, which will authorize the court to strike their names from the list of attorneys.

Still less can they be so deemed, where the letter was in answer to one written to them by the judge, in which he had spoken to them of discipline relaxed, and disorder introduced in the conduct of business in court; of inadvertent remarks indicative of contempt for his decisions, and calculated to impress the public mind unfavourably to the court, and to himself as its organ; of giving place to a successor, who might obtain their confidence and co-operation, and in which he had, in conclusion, solicited an expression of their sentiments and determination as to the future, in relation to the grievances he had presented.

Nor is the character of the transaction altered by the publication of the correspondence in a public newspaper, by the attorneys, not for the purpose of assailing the reputation of the judge, but of defending their own.

THIS case came before the court in pursuance of an act of assembly, passed on the 14th day of March, 1835, (Pam. L. 70,) by which the Supreme Court of this commonwealth was authorized and required to take jurisdiction of a certain record and proceedings in the Court of Common Pleas of the county of Fayette, of the term of January, 1835, whereby the names of eight attorneys were, on the 8th day of January, 1835, ordered to be struck from the list of attorneys of the said court; and that the said Supreme Court shall, with as little delay as possible, and during their session commencing at the city of Philadelphia on Monday the 16th of March, 1835, proceed to hear and determine the questions arising upon the said record and proceedings in any shape, which may be approved or prescribed by the court; and shall cause the de-

cision of the said Supreme Court to be duly certified to the Court of Common Pleas in the county of Fayette; and make all orders, and direct all measures which may be necessary and proper, and which shall be effectual in the premises.

The following is a copy of the record and proceedings of which the Supreme Court was directed to take cognizance:

FAYETTE COUNTY, *ss.:*

At a Court of Common Pleas, &c., held at Uniontown, in and *for the county of Fayette, the 6th day of January, in the year of our Lord 1835, before the Honourable Thomas H. Baird, Esquire, President, and Charles Porter and Samuel Nixon, Esquires, Associate Judges of the same court. [*192]

The court grant a rule upon John M. Austin, John Dawson, Joshua B. Howell, John H. Deford, Joseph Williams, Alfred Patterson, Robert P. Flenniken, Rice G. Hopwood, William M'Donald, and William P. Wells, Esquires, to show cause why they should not be stricken from the list of attorneys of this court.

Copy of the letter above referred to.

UNION TOWN, PA., Oct. 3d, 1834.

DEAR SIR,—

We have delayed replying to your letter under date of the 12th of September, 1834, addressed to the members of the bar of Fayette county, until the present time, to afford an opportunity for consulting together, and also for mature reflection upon the matters to which you refer. We regret, in common with your honour, that we have not been able, in harmony and with satisfaction to ourselves and the people of the county, to transact the business of our courts. The public confidence seems to be withdrawn alike from the bar and the court. Perhaps your honour's retiring from the bench, as you have intimated a willingness so to do, and giving the people the power to select another, would be the means of producing a better state of things, and a more cordial co-

operation from all sides in the dispatch of the business of the county. This expression of our views is made in candour and sincerity, without a wish to inspire one unpleasant thought or unkind feeling, but under a sense of duty to the county in which we live, to your honour, and to ourselves.

Very respectfully, yours, &c.,

JOHN M. AUSTIN,	A. PATTERSON,
JOHN DAWSON,	R. P. FLENNIKEN,
JOSHUA B. HOWELL,	R. G. HOPWOOD,
J. H. DEFORD,	WM. M'DONALD,
J. WILLIAMS,	W. P. WELLS.

Post marked "Union Town, Pa., November 7." Directed "Thomas H. Baird, Esq., Williamsport, Washington county, Pa."

Filed 6th January, 1835.

Answer of the Respondents to the foregoing rule.

The undersigned who are required by a rule of court, entered this day to show cause why they should not be stricken from the list of attorneys, present this their answer to that rule.

We earnestly, but respectfully protest against the legal power and *authority of the court to enter and enforce such a rule for the cause alleged.

[*193]

The rule appears to be found and predicated on the letter of the undersigned, addressed to Judge Baird, dated October 3d, 1834. To enable a full understanding of the whole matter, a letter of Judge Baird, dated September 12, 1834, is herewith presented.

It is evident that the letter of the undersigned which contains the supposed offensive matter, is a reply and response to the letter of Judge Baird to them addressed. It is certainly respectful in its terms, and as is sincerely believed and positively asserted, contains neither in words, meaning, nor intention, the slightest contempt, or the least disrespect to the court or any of its members.

The respondents would be entirely at a loss to comprehend how it could be possible to give their letter, from its terms, an

offensive interpretation, were they not informed from another source, that the following paragraph is considered objectionable:—"the public confidence seems to be withdrawn alike from the bar and the court." We, by this paragraph, expressed our honest conviction, and intended no contempt to the court. It is a response, in some measure, to that part of Judge Baird's letter, in which he himself says, that the circumstances to which he refers were calculated to make "a lodgment in the public mind injurious to the authority and respectability of the court, and particularly of himself, its organ."

It will also be perceived from the two letters referred to, that the correspondence did not take place between the bar and the court,—it was between the respondents and Judge Baird, at his instance and request. The occurrence, asserted as constituting some undefined offence, did not take place in presence of the court—it took place out of court, and *in pais*.

Far, very far, therefore, are we from being guilty of any offence against the court. As to Judge Baird, personally, the letter distinctly and unequivocally states that our views were "made in candour and sincerity, without a wish to inspire one unpleasant thought or unkind feeling."

JOHN M. AUSTIN,	J. H. DEFORD,
JOHN DAWSON,	WM. M'DONALD,
JOSHUA B. HOWELL,	J. WILLIAMS,
WM. B. WELLS,	R. P. FLENNIKEN,
ALFRED PATTERSON,	R. G. HOPWOOD.

Copy of the letter from Judge Baird, to the gentlemen of the bar, referred to in the above answer.

Friday, Sept. 12, 1834.

GENTLEMEN:—

You have, no doubt, long been aware that the occurrence of a variety of disagreeable circumstances in the conduct of our business in *court, has rendered my situation often exceedingly painful and perplexing. It is possible I [*194] have had my full share in the causes which have led to this

state of things. I think, however, upon reflection, you will be satisfied that in a great degree, it has been owing to the irregular manner of the bar in the trial of causes. It is unnecessary to go into particulars at this time. It has been the subject of complaint and of conflict, distressing to me and unpleasant to you. Finding a remedy hopeless without your aid, I have frequently brought my mind to the conclusion, that perhaps I ought to withdraw and give you the opportunity of getting in my room some other gentleman, who would have your confidence and co-operation. This determination has, heretofore, been yielded to the advice of friends, upon whose judgment I have relied.

Early in the present week I requested an interview with you, that we might talk these matters over, and perhaps agree to a united effort for reform. You were prevented from meeting as proposed. In the meantime, the occurrence of a brutal attack upon me by a ruffian, growing out of a trial in court, has more and more convinced me of the necessity of coming to some conclusion, that may prevent the repetition of such outrages. In this subject I wish not to be misunderstood. The act of a brute or bully can never drive me from the post of duty or of honour. I thank God that in the performance of my official functions, I have been preserved from the operation of fear, as I hope I have been from the influence of favour or affection. I never, I repeat, have been deterred by any apprehension of personal danger, although I have often been aware of peril. I have known that there was a cause for it. The inadvertent, but as I think, indiscreet indulgence of side-bar remarks, indicative of dissatisfaction with the decisions of the court, and perhaps sometimes of contempt, has been calculated to make a lodgment in the public mind, injurious to the authority and respectability of the court, and particularly of myself, as its organ, and has had a direct tendency to rouse the malignant passions of a disappointed or defeated party. I have often observed, or been informed of these things, and have thought they might lead to disastrous consequences. A correct, judicious man, if he thinks his case has not been correctly decided, will seek redress in the legitimate mode only;

or, if that is not accessible, (which seldom happens,) will submit to it, as we all do to unavoidable misfortunes. A ruffian, however, if told by his counsel that injustice has been done him in the administration of the law, may feel disposed to seek vengeance on the judge. In the case referred to, I think the cause and effect can be distinctly traced. The earnestness and positiveness of the counsel on the trial, and expressions thoughtlessly dropped afterwards, perhaps inflamed an unprincipled fellow to make an attack. It may be, however, that it would not have occasioned it, had he not been encouraged by other persons. I have only my suspicions, and make no charge against *any one. I exculpate the counsel in that case, and I exculpate the whole bar from the most [*195] distant idea of producing such a catastrophe. All that I mean to say, is, that the practice I have mentioned has a direct tendency to incite to such outrages; and that in the particular case, (in connection with other causes,) it did lead to the violence.

The same cause may produce the same effect. I must be always exposed to such consequences, if matter of excitement continues to be furnished to wrong-headed, brutal suitors. If I could have the confidence and support of the bar, and the assurance of a change in their manner towards each other and towards the court, in the public conduct of busidess, the office I hold would be rendered dignified, honourable, and pleasant; but otherwise, it must become altogether intolerable. On my part, there is no want of good feeling, and I take this occasion to declare, that there is not one of you for whom I entertain unkind sentiments. On the contrary, there is no one whose interests I would not advance, or whose honour I would not maintain, so far as in my power. As to myself, I have no right to claim your friendship, though I should be glad to have it; but I think in the discharge of my official duties, I ought to have your courtesy and respect; and when I err, forbearance, in manner, and recourse discreetly to the proper remedy, (which I am always disposed to facilitate,) and not to inflammatory expressions of disapprobation or contempt addressed to the public or the party.

I have thus disclosed to you frankly my feelings and views. In reply, I wish your sentiments and determination as to the future in relation to the grievances I have presented, and propose, therefore, that you should take a few minutes to confer together, and inform me of the conclusion to which you may arrive. I am truly yours, &c.,

THOS. H. BAIRD.

Messrs. Ewing, Todd, Dawson, and the other gentlemen of the bar of Fayette county, present.

Second answer of the respondents.

January 7th, 1835.

The undersigned, after reiterating the protest contained in a former answer, make this further reply to the rule entered yesterday against them.

When the former answer was prepared, it was not known that the publication of the correspondence between the bar and Judge Baird, in the newspapers, constituted a portion of the supposed offence against the court, the record not presenting that aspect of the case.

They now reply to this matter, and to cause a more perfect understanding thereof, they present herewith a letter from [*196] Judge Baird *to the undersigned, dated December 15, 1834. We now ask that the three letters on record may be carefully examined, in connection with our former answer to the rule to show cause. We cannot but think that the court will then be satisfied that the last letter of Judge Baird contains imputations and strictures not warranted by anything said in our communication to him, when properly understood.

In some way, the existence of the controversy reached the public ear. It immediately assumed a false shape in connection with an assault committed upon the judge by a suitor in court. Misapprehension about the nature of the correspondence was produced. For want of correct information, false assertions were made, and false inferences drawn. It became a public matter, involving seriously public interests. The correspondence related to public affairs. The letters by no means

being private and confidential, we considered it our imperative duty, in justice to ourselves and in justice to the public, to lay the whole correspondence, as it really was, before the whole community. It was accordingly done, and for the purposes intimated. The court will clearly perceive, that in this act there was no offence committed against the court, but it was a proceeding rendered every way necessary, as it gave the true state of the controversy, and supplied the place of false rumors in relation both to Judge Baird and ourselves.

JOHN DAWSON, J. WILLIAMS,
JOHN M. AUSTIN, R. G. HOPWOOD,
WILLIAM P. WELLS, A. PATTERSON,
JOSHUA B. HOWELL, R. P. FLENNIKEN,
J. H. DEFORD.

(Copy of a letter from Judge Baird to the respondents, dated 15th December, 1834, and referred to in the above answer.)

HARLEM, December 15, 1834.

Messrs. Austin, Dawson, Howell, Deford, Williams, Flenniken, Hopwood, M'Donald, and Wells, members of the Fayette county bar.

Your communication, dated 3d October, (post marked November 7th,) which purports to be an answer to my letter of 12th September, came to my hand on Saturday night last. It had been withheld from me by my friends, during my recent illness, from an apprehension it might produce an increased excitement prejudicial to my health. In this they were mistaken. I have experienced too much of the ills of life, and have at present too many other causes of agitating concern to be greatly disturbed by it. Perhaps, were it not for the knowledge of human nature, which I have dearly bought, I might have been surprised and pained to receive such a paper from persons standing to me in the relation that you do, not one of whom I have ever intentionally injured in *thought, word, or deed. I was, however, prepared for such an [*197] "expression of your views," though there are some signatures I did not expect to see. Had your letter been framed imme-

diately in answer to mine, and put into my hands at the time, I do not know what course I might have adopted in the hurry of my feelings. I certainly have often entertained the thought of leaving my situation, influenced by a regard to my personal comfort, and I will add, also, from considerations towards you that spring more from my heart than my head. This purpose I have often yielded to the judgment and advice of friends. I have also repeatedly said that, unless a reform could be effected in the mode of doing business in court, I would not continue in the office. Immediately after the occurrence at the last term, to which I referred in my letter, I hastily expressed my intention never to return to the county. This purpose was formed not on account of the immediate outrage, (which I was aware I could sufficiently punish,) but because I believed (as I still do), that the ruffian was instigated by others. It is not in my recollection that I declared in my communication to you, any present design of abandoning my office at your request; and I am confirmed in this idea, from the fact, that a judicious friend strongly remonstrated against such an intimation being given. But if I had even so expressed myself, subsequent reflection, long before I received your letter, had abundantly convinced me that it would be wrong to do so at this time and under the circumstances in which I am placed in my official relation to you and to the people. The station I hold is not mine—nor is it yours—it belongs to the public, and has been conferred upon me (without my solicitation), by the constitutional agent. Unless from private considerations I think proper to give it up, (and the right to do so is recognized by law,) it cannot be taken from me, but in the way the people have designated. It would be a violation of their rights, and a dereliction of duty, if I could be constrained or influenced to abandon it by any other process. I am now satisfied that I ought not to have addressed you as I did. It was compromising the dignity of the office entrusted to me to solicit from you a reform in your manner of conducting your business at the bar, when I ought to have compelled it. In concurrence with my brother judges, I should have prescribed the order and discipline of the court, and enforced

obedience. This error, however, also proceeded more from my heart than my head; and you are the last persons in the world who ought to complain of it. Henceforth it will be my endeavour to correct this mistake; and, depend upon it, if there is not a reform without making it a matter of compact with you, it will not be my fault. But however I might be disposed to resign my office from motives of private convenience and peace of mind, (which I have a right to do,) or perhaps from a wish to indulge you in a desired preference for some other person in my stead, (the propriety of which I now doubt,) yet still the terms of your communication *entirely preclude me from doing so, without yielding my personal and judicial honour. [*198]

You undertake to assert "that the public confidence seems to be withdrawn alike from the bar and the court." If the first part of the proposition is to be understood as an admission of the state of things in relation to yourselves, it is not my business to combat it;—but I deny your right or warrant to make the latter allegation. It is of grave import and deliberately set forth, as you took time, as you say, "to afford an opportunity for consulting together and also for mature reflection." It is the basis of your request that I should resign; for the other matters, in relation to the manner of conducting the business of the court, you were well aware it was in your power to adjust. Undoubtedly, therefore, it involves a charge of official delinquency; such as would warrant the removal of the judges, either by impeachment or address. "Public confidence" is indeed the foundation on which must rest the usefulness, respectability, and authority of the courts: if that is destroyed, all that is valuable in our judicial institutions must fall, and the personal honour of the judges be involved in the general ruin. To weaken or impair, then, that faith which the people ought to have in the integrity and capacity of those who administer their laws is a great public mischief. Certainly there is no way more calculated to produce such a result than to assert that such is the present fact. The laws will not allow that the people have "withdrawn" "their confidence" from their judicial agents, unless it has been so ascertained in the mode

prescribed in the constitution. It cannot be tolerated that the official standing of the judges is to be tested by the sneering remarks we may hear on the streets, or by the vituperation of bar-room censors. I leave it to you, therefore, as a matter of professional opinion, to say, whether it would not be indictable as a libel for any one to publish in writing that the "public confidence is withdrawn" from a court. Perhaps, when members of the bar so far forget the "fidelity" to which they are bound as to promulgate such a declaration, a discreet but decisive exercise of the summary power vested in the judges, over the conduct of their own officers, may be considered the most obvious and proper course. On this point it would be premature in me to express an opinion now. Your communication will be before us at the next term, and after deliberate examination and hearing, the decision of the court will be pronounced. There is another matter which I think it proper to apprise you of, with the hope that a satisfactory explanation will be offered. I have understood that a report is in circulation, emanating from some of you, that I have charged the whole bar with being concerned in the outrage lately committed upon me. If it is true that such an idea has been thrown abroad, it is so base a perversion of my language, that I cannot conceive the malignity of the heart that could engender it. [*199] When such means are employed to excite popular *prejudice, it would not be surprising if "public confidence" should be "withdrawn" from me at least. My letter will show for itself; and I defy the ingenuity of Satan himself to make out any such thing; on the contrary, I think it contains a distinct "exculpation of the whole bar from the most distant thought of producing such a catastrophe." The whole matter in relation to that outrage will be before the court at their next term, and the associate judges will be called upon to sustain and assert the violated authority and dignity of the judicial office, by the exercise of their summary power of punishing such gross contempts. At the last sitting I made up my mind to take no step myself, as it might be thought I acted under excited feelings: and the public prosecutor, who is considered as particularly representing the people in relation to

such things, did not think proper to present to the court the propriety and necessity of this course. It is, however, indispensable; for a judicial tribunal that cannot protect itself without resorting to another tribunal for aid or redress, must cease to exist.

In conclusion I will only say that upon "mature reflection" it is my determination not to resign at present; and that it is also my abiding determination never to resign upon the ground stated in your letter. I hope to be able to take my seat on the bench in Fayette county on the first Monday of January next. If I have lost any degree of the public confidence, it shall be my endeavour to regain it, by a faithful performance of my judicial functions. With the aid of my brother judges, I will try to preserve the order and discipline of the court, by a discreet but energetic exercise of the power which the law gives us; and perhaps you may be satisfied that the laxity which has, no doubt, been a considerable cause of complaint, was more owing to my kind feelings towards you, than to any want of moral courage to encounter the consequences that may result from the honest discharge of public duty. I shall perform my official functions with a sincere desire to do right, and shall expect from the members of the bar, that they behave themselves "with all good fidelity to the court as well as to the client."

I am, &c.

TH. H. BAIRD.

(*Separate Answer of William M'Donald.*)

On the subject of the difficulty between the bar and the court, I take the liberty of making the following statement: I was opposed to the publication of the correspondence from the beginning, and have frequently so expressed myself, thinking it would have a tendency to widen the breach without being calculated to do any good. From first to last I have been free from the control of any intention to cast disrespect or contempt upon the court or any of its members.

WILLIAM M'DONALD.

[Case of Austin and others.]

(*Opinion of the Court.*)

In the matter of John M. Austin, John Dawson, Josh. B. Howell, *William P. Wells, Alfred Patterson, J. H. Deford, William M'Donald, J. Williams, R. B. Flenniken, and Rice G. Hopwood, attorneys.

[*200]

January 6, 1835, rule to show cause why they should not be stricken from the list of attorneys of this court.

January 8th, 1835, opinion of the court.

BAIRD, President.—The court has given to the papers presented by the respondents in this case, the most careful consideration and the most favourable construction their import would at all admit. It is with the deepest regret, we are constrained to say that they are by no means satisfactory. We cannot regard them as removing the offensive and injurious operation of the matter which has been published to the world in relation to this court, and which forms the gravamen of the rule. All that we have required is, that the gentlemen would distinctly place in their answer a disavowal of any intention to impute to the court or its members anything which would lower them (in their official character) in the esteem and confidence of the people. This has been, and is still refused. No alternative therefore remains. We must abandon our judicial honour, respectability, and authority, and endeavour to sustain them in what we conceive to be the legitimate mode.

It is not the common law, or statutory power to punish contempts which we are about to exercise. It is the coercive control and discipline which the courts have always legally employed in order to preserve in the members of the bar the observance of that trust, courtesy, and respect, which is indispensable to the safe and orderly administration of justice. An early act of assembly, (22d May, 1722,) declares that attorneys, if they misbehave, shall be liable "to suffer such pains, penalties, and suspensions, as attorneys at law in Great Britain are liable to in such cases." And by an act of last session, "If any attorney shall misbehave himself in his office of attorney, he shall be liable to suspension, removal from office, or to such

other penalties as have hitherto been allowed in such cases by the laws of this commonwealth."

By these acts the power of the courts here is the same as is exercised by the courts in England; we consider it unquestionable whenever there is "misbehaviour" in an "attorney." The exercise of this power is a judicial act, and although it is summary, yet it can nowhere be so safely lodged, both as respects its prompt and efficient application when necessary, and also as respects the security and interest of the members of the bar, who have always the feelings and attachment of the judges with them, when they conduct themselves with propriety.

The term "misbehaviour" in our acts of assembly, has an evident relation to the official oath of an attorney. He is sworn to "behave" himself with all good fidelity to the court, as well as to the client. What does this include? as between counsel and client, it seems to be well understood. A lawyer would not betray the interest or the *fame of the man who has given him a paltry fee, nor would the law [*201] allow him to do so in any case in which he is engaged. Does it not import anything as respects the court? Can an attorney be tolerated in publishing to the world that "public confidence is withdrawn from the court," and then come in and claim to stand in that relation which the law contemplates as essential to the decorous, orderly administration of the public business? If so, we do not understand the meaning of the word "fidelity," or the relation it creates.

In this case we think there has been "misbehaviour" on the part of the gentlemen against whom the rule is granted. The publication in relation to the court we consider a libel. It has been done in their office of attorney, as they themselves show. The whole matter refers to the public relation between the court and the bar. The first letter of the president, was in truth an act of the whole court, for although signed by him, it was with the concurrence of his brother judges. It was intended as a kind appeal to their good sense and generous feelings, and by no means as insinuating any imputation more than occasional inadvertent side-bar remarks and other irregu-

larities, as the letter plainly imports. It was communicated in a private manner because it was thought more likely to produce a good effect, than a public address. They in all their proceedings and in their answers, speak of it in their official relation. The only question then, is—does their conduct amount to "misbehaviour," and to what degree? We think it does, and to such an extent of aggravation, as virtually destroy the relation of "fidelity" which must exist towards the court by the members of the bar. If that relation is extinguished and no longer exists, the official connection must necessarily be dissolved; otherwise the spirit of the law is violated.

As we have no personal feelings to indulge, (except those of regret,) we forbear any harsh commentary upon the matters involved. We would leave it to the calm reflection and better feelings of the gentlemen themselves, and would hope that they may yet be induced to avail themselves of the door which is still open to a returning sense of duty. We have no appeal to make to the public, except what a just estimate of our rectitude of purpose may present to their virtue and good sense.

It is ordered that the names of John M. Austin, John Dawson, Joshua B. Howell, Wm. P. Wells, Alfred Patterson, John H. Deford, J. Williams, and R. P. Flenniken be struck from the list of attorneys of this court.

In the case of William M'Donald the rule is discharged.

In the case of Rice G. Hopwood the rule is continued.

Judge NIXON dissented from the decisions of the court as follows:

January Term, 1835.

The court enter a rule on certain members of the bar therein *mentioned, to show cause why they should [*202] not be stricken from the list of attorneys, for making or causing to be made certain publications calculated to bring the court into disrepute, to which they have responded.

I concur with my brother judges that certain parts of said publications are calculated to bring this court into disrepute with the people, and ought to be punished; but taking into

consideration the cause that elicited or drew forth those publications, and the concessions and explanations that have been made by the respondents to the court, the penalty of an indefinite suspension would be very severe. Had our rule been left open so as not to require a specific punishment, I would have been very happy in co-operating with my brother judges in inflicting some adequate punishment, if any, but as there is no alternative, I must dissent from their judgment, and think the rule ought to be discharged.

SAMUEL NIXON.

(Separate answer of Rice G. Hopwood, Esq.)

January 9th, 1835.

Present Judges PORTER and NIXON.

In answer to the rule granted by the court upon the members of the bar to show cause why they should not be stricken from the list of attorneys, the undersigned candidly but respectfully submits the following reply as to the publication.

That he intended no contempt of court, nor did he intend to call in question, in any shape, the integrity of their official conduct, or detract from their standing in the estimation of the public.

RICE G. HOPWOOD.

By the court.—The rule in the case of Rice G. Hopwood is discharged.

The record being thus before the Supreme Court, the eight gentlemen of the bar whose names had been stricken off the list, appeared with the leave of the court by their attorneys, and suggested for its hearing and determination the questions presented by the following—

Bill of Exceptions.

First. The Court of Common Pleas of Fayette county erred in considering the said attorneys, as the authors of a letter to the Hon. T. H. Baird, under date of 3d October, 1834, liable to the penalty of being struck from the roll for an alleged libel upon the court.

[Case of Austin and others.]

Second. The court below erred in considering that by the writing or publishing of the said letter, the said attorneys did "misbehave themselves in their offices of attorneys" respectively.

Third. The court below erred in considering that by the [*203] writing *or publishing of the said letter the said attorneys had departed from their obligation "to behave themselves in the office of attorney within the court according to the best of their learning and ability, and with all good fidelity, as well to the court as to their clients."

Fourth. The order of the court below that the names of the said attorneys be struck from the list, is unconstitutional, illegal, and oppressive, and the same should be forthwith reversed and annulled.

These questions were fully argued by *Dallas* and *J. R. Ingersoll* on behalf of the gentlemen of the bar; and by

J. Sergeant in support of the proceedings of the Court of Common Please of Fayette county.

The opinion of the court was delivered by

GIBSON, C. J.—An attorney-at-law is an officer of the court. The terms of the oaths exacted of him at his admission to the bar, prove him to be so; "you shall behave yourself in your office of attorney within the court, with all due fidelity as well to the court as the client." Again: it is declared in the constitution, article 1, sec. 18, that "no member of Congress or other person, holding any office, (except attorney-at-law, and in the militia,) under the United States or this Commonwealth, shall be a member of either house (of the legislature), during his continuance in Congress, or in office," which is a direct constitutional recognition. And his office is an office for life. Though recognized by the constitution as we have seen, it is without limitation of duration by the terms of admission to it, by the provisions of the constitution, or by any statute. The grant of an office without express limitation, at common law, being taken most strongly against the grantor, endures for the life of the grantee; and though this

principle has not been applied to offices within the grant of the executive, it must necessarily be applied to the office of attorney, for to subject the members of the profession to removal at the pleasure of the court, would leave them too small a share of the independence necessary to the duties they are called to perform to their clients and to the public. As a class, they are supposed to be, and in fact have always been, the vindicators of individual rights, and the fearless asserters of the principles of civil liberty; existing where alone they can exist, in a government not of parties or men, but of laws! On the other hand, to declare them irresponsible to any power but public opinion and their consciences, would be incompatible with free government. Individuals of the class may, and sometimes do, forfeit their professional franchise by abusing it; and a power to exact the forfeiture must be lodged somewhere. Such a power is indispensable to protect the court, the administration of justice, and themselves. Abuses must necessarily creep in; and having a deep stake in the character of their profession, they are vitally concerned in preventing it from being sullied by the *misconduct of unworthy members of it. No class of the community [*204] is more dependent on its reputation for honour and integrity. It is indispensable to the purposes of its creation to assign it a high and honourable standing, but to put it above the judiciary, whose official tenure is good behaviour, and whose members are removable from office, by the legislature, would render it intractable; and it is, therefore, necessary to assign it but an equal share of independence. In the absence of specific provision to the contrary, the power of removal is, from its nature, commensurate with the power of appointment, and it is consequently the business of the judges to deal with delinquent members of the bar, and withdraw their faculties when they are incorrigible.

But the end to be attained by removal, is not punishment, but protection. As punishment, it would be unreasonably severe, for those cases in which the end is reclamation and not destruction, and for which reprimand, suspension, fine, or imprisonment seem to be the more adequate instruments of correc-

tion; for expulsion from the bar blasts all prospects of prosperity to come, and mars the fruit expected from the training of a lifetime. For this reason, the statute to regulate attachment and summary punishment for contempts, seems to be inapplicable to this class of cases. Expulsion may be proper, where there has been no contempt at all; as in cases of brutality, drunkenness, and the whole circle of infamous crimes. It is one thing to remove from office for unfitness, and another to punish for contempt. In fact the court may have recourse to both together, and there is no reason, therefore, why it should not be at liberty to proceed on the ground of unfitness, and waive the contempt. It is not doubted that any breach of the official oath is a valid cause, for proceeding for the former; for the man who deliberately violates the sanctions of a lawful oath, proves himself to be unworthy of further confidence; society has no other hold upon him. The most insignificant breach of the fidelity enjoined may, therefore, be visited with this measure. But it is supposed that as this fidelity is exacted by the terms of the oath, but "in the office of attorney," and "within the court," the act which may violate it, must be done in the face of the court. The oath undoubtedly looks to nothing like allegiance to the person of the judge, unless in those cases where his person is so inseparable from his office, that an insult to the one, is an indignity to the other. In matters collateral to official duty, the judge is on a level with the members of the bar as he is with his fellow-citizens, his title to distinction and respect resting on no other foundation than his virtues and qualities as a man. But it is, nevertheless, evident that professional fidelity may be violated by acts, which fall without the line of professional functions, and which may have been performed out of the pale of the court. Such would be the consequence of beating or insulting a judge in the street for a judgment in court. No one would pretend that an *attempt to [*205] control the deliberations of the bench, by the apprehension of violence, and subject the judges to the power of those who are, or ought to be subordinate to them, is compatible with professional duty, or the judicial independence

so indispensable to the administration of justice. And an enormity of the sort, practised but on a single judge, would be an offence, as much against the court, which is bound to protect all its members, as if it had been repeated on the person of each of them, because the consequences to suitors and the public would be the same; and whatever may be thought in such a case, of the power to punish for contempt, there can be no doubt of the existence of a power to strike the offending attorney from the roll.

It is equally obvious that an attempt to overawe the bench by menace, challenge, or the employment of an engine so powerful as the press, is an offence of the same stamp, the difference being but in the means of committing it. It may be said the judge is bound to despise consideration of danger or annoyance, and do his duty manfully without regard to consequences. The law, however, deals differently with human infirmity, and provides for the influence of those hopes and fears which are in a greater or less degree inseparable from our nature. Moral courage, to an ordinary extent, is certainly a necessary qualification for the bench; but physical courage is no more a qualification, than animal strength or prowess in fighting. The enormity of breaking the peace by assaulting its official conservators, which might be sufficient evidence of professional disqualification, without recourse to the purpose to be gained by it, would be wanting in the case of a libel, unless it were a very gross one; and therefore the motive should be clearly shown to have been the acquirement of an influence over the judge in the exercise of his judicial functions by the instrumentality of popular prejudice. Does the existence of professional responsibility for libel, when thus limited and guarded, impinge on the liberty of the press? The conduct of a judge, like that of every other functionary, is a legitimate subject of scrutiny, and where the public good is the aim, such scrutiny is as open to an attorney of his court as to any other citizen. It is the prostitution of it to impure purposes, that can bring him into collision with his professional fidelity. Even a battery might be committed by an attorney on a judge consistently with the official relation, if provoked in matters of social inter-

course. It is the motive, therefore, that makes an invasion of the judge's rights a breach of professional fidelity; from which he is to be protected for the sake of the public and the suitors of his court, not for his own. To impair the general confidence in the purity and efficiency of the administration of distributive justice, is a vital injury to it; and the attorney who abuses the public credulity with a view to that effect, cannot complain if the faculties from which his capacity for mischief is mainly derived, be taken away from him. The sum of the [*206] matter *is, that an attorney at law holds his office during good behaviour, and that he is not professionally answerable for a scrutiny into the official conduct of the judges, which would not expose him to legal animadversion as a citizen. Such being the principle, it is necessary to ascertain the form and pressure of the case to which it is to be applied. The ground of disrespect laid by the President of the Common Pleas, is the letter sent to him by the respondents. The rule to show cause was laid without specification of cause for expulsion, except that this letter was then put on the record, and undoubtedly as containing the matter to which they were required to respond. It was only when told that the publication of the correspondence would be insisted on as a separate charge, that they put in a supplementary answer to it, and having been treated as such there, it is to be treated as such here.

But nothing was said of the prefatory matter, which introduced the correspondence to the public; nor was the newspaper which contains it, even filed.* It is doubtful, therefore,

* The prefatory matter spoken of by the Chief Justice, was published, with the correspondence, in the Pennsylvania *Democrat*, published in Uniontown, Fayette county, on the 31st of December, 1834, and is as follows:

"*To the People of Fayette County.*

"The following correspondence between Judge Baird and the members of the bar of Fayette county, is submitted for publication, under the belief, if it has any interest, it belongs to the people of the county.

"Immediately after the assault upon the judge at the last term, he declared that he considered the attack upon him as the act of Fayette county, and that he had no doubt that two-thirds of the people of Uniontown knew that it would be made before it took place—that he would never hold another

whether it can *be treated as a part of the case. For myself I should say it cannot. The additional matter [*207] put upon the record by the respondents, consists of two letters addressed to them by the president, the first being that which elicited the offence of the respondents, and the second a reply to it. The case is then made up of these three letters, the fact of publication, and possibly the prefatory remarks which accompanied it. Now, without taking into view the solicitation of an interchange of views contained in the president's first letter, the assertion that the court had lost the confidence of the public and the suggestion of his retirement as the means of restoring it, might be deemed an impertinence; but not affecting the course of his public duty, it could not be deemed a breach of professional fidelity. But looking to the terms of

---

court in the county—that he would resign. These declarations, the bar believed, had been made by the judge. They feel confident there was no foundation for the charge against the people of Uniontown, or the county, and knew well none existed to justify the imputation against themselves.

"They were also informed that the judge had written a most violent letter involving them in the criminality of the assault upon him, but which he suppressed at the instigation of his friend, and in its stead wrote the one below.

"The members of the bar felt exceedingly mortified that it should enter into the mind of any rational being to connect them in any form or shape with the assault upon Judge Baird, yet it is the burden of his whole letter that the misbehaviour and improper conduct of the bar produced the assault upon him. This is the sentiment it breathes from beginning to end. When the bar, however, learned that he entertained similar sentiments toward the people of Uniontown, and perhaps the whole county, they declined from self-respect to notice the letter in any other matter than as contained in their answer. It is firmly believed that not an individual inhabitant of Uniontown had the slightest intimation of such a design in Stevens. The act was deeply regretted, and the most prompt measures taken to bring the offender to trial. He was instantly seized, and taken before a magistrate. The public prosecutor immediately repaired to the justice's office, and remained to see that the defendant was effectually bound to appear at the next court, to answer to the law for the act. This was all that could be done, or that was supposed could be done. Not a single suggestion was there made that any other steps were necessary, or lawful, to secure the punishment of the defendant. The judge asked the opinion of the bar, and they gave it. If he compromised 'the dignity of his office' in addressing his letter to them, they would have compromised their own dignity and honour in answering in any other than the language of truth and their own honest conviction: whether they did so or not is freely left to the people to decide."

his letter, we find their expressions to be but an echo of his own. He had spoken to them of discipline relaxed and disorder introduced; of inadvertent remarks indicative of contempt for his decisions, and calculated to impress the public mind unfavourably to the court and himself its organ; and of giving place to a successor who might obtain their confidence and co-operation. His design to do so, he had spoken of as having been yielded to the advice of his friends, but not as having been relinquished; and in conclusion, he had solicited their views in reference to the future. These sentiments were expressed neither in the words nor in the connection in which I have arranged them; but it is evident they were considered in this connection by the respondents in framing their reply. "The public confidence," they said, "seems to be withdrawn alike from the bar and the court. Perhaps your honour's retiring from the bench, as you have intimated a willingness to do, and giving the people power to select another, would be the means of producing a better state of things, and a more cordial co-operation from all sides, in the dispatch of the business of the court. This expression of our views is made in candour and sincerity, and without a wish to inspire one unpleasant thought or unkind feeling, but under a sense of duty to the county in which we live, to your honour, and to ourselves." Surely these expressions breathe anything but contumely. It is alleged that a memorial presented to the court a few months before, and signed by five of the eight respondents, and the remarks prefixed to the correspondence, evince a different state of feeling. To a mind exasperated by a sense of outrage, it would naturally appear so; but the impression would be effaced by reflection. The memorial being no part of the case, is to be laid out of view; but we are bound by a sense of what is due to the occasion to express no less than painful surprise, to learn that gentlemen whose professional intercourse with us has been superior to all exceptions, have participated in scenes elsewhere, whose reminiscences can furnish no subjects of gratulation or sentiments of self-respect. The remarks prefixed to the correspondence were doubtless written in an angry temper; but as the contest had assumed a character of determined

[Case of Austin and others.]

*hostility, they were not fairly indicative of the temper that prevailed before; and whatever may have been [*208] the secret motive of the respondents, the language of their letter is bland and respectful.

The character of the act of publication depends on the motive for it. Was the object of the respondents to assail the reputation of the president or to defend their own? I am unable to understand why it should have been supposed the former; for there is nothing in the correspondence to disparage him as an officer or a man, though labouring under evident, but excusable excitement, his language was temperate and courteous, the measure proposed alone being badly chosen. The officer who parleys with resistance, proposes terms of capitulation. A better, and the only effectual cure for the disorder of his court, would have been a firm, but temperate and equable application of authority to the refractory, and the prompt expulsion of those who braved it. Had the respondents been removed from office for actual insubordination, their case would have been a clear, but hopeless one. But they have earnestly and uniformly protested, that the object of the publication was not to affect the judge, but to disabuse the public mind; and professing this to be their motive, it seems to me that in the absence of evidence to disprove it, we are bound to receive it as the true one. They too acted from the impulse of excitement, for which allowance is to be made, believing, as they say they did, that the president had implicated them in the disgraceful assault on his person. But what seems to be entitled to a decisive influence in a legal view, is the fact, that the publication was made by them, not as members of the bar, but as persons put upon their defence, by an intimation that they were to be dealt with criminally. In that predicament, to entrench themselves in popular prejudice, may have been wrong in them as men, but certainly involved no dereliction of professional duty. In conclusion, it appears that a case to justify the removal of the respondents, has not been made out; and it is therefore considered that the order which made the rule absolute be vacated, and the rule discharged; that the respondents be restored to the bar; and

[Case of Austin and others.]

that this decree be certified to the Common Pleas of Fayette county.

Decreed accordingly.

Cited by Counsel, 1 G. 454; 7 Wr. 513.

Cited by the Court, 5 W. & S. 273; 12 N. 121.

A case similar to this will be found in 14 N. 220, where the lower court, on the authority of this case, dismissed two attorneys who had published a libellous article concerning the court in a newspaper of which they had the management. But the case was reversed, and Chief Justice SHARSWOOD, in commenting on this case, said (p. 238), that "there were two considerations now bearing upon the question which did not exist at the time the decision was rendered, namely: the clause in the constitution of 1874, guarding the liberty of the press, and the fact that now the judiciary is elective."

[*209] *[PHILADELPHIA, APRIL 13, 1835.]

Helffenstein *against* Thomas.

IN ERROR.

The acts of assembly of 1700 and 1729, to prevent clandestine marriages, are not obsolete in their provisions for publication of banns.

In an action against a clergyman to recover the penalty given by the latter act, the burthen of the proof lies on the plaintiff to show that there was no publication of banns.

The action may be sustained, although the minor was not dependent on his parent for support, but lived away from his parent and supported himself.

The law implies injury to the parent without proof of actual damage.

THIS was a writ of error to the District Court for the city and county of *Philadelphia*.

It was an action of debt brought by Thomas against the reverend Samuel Helffenstein, a minister of the German Reformed Church, to recover the penalty of fifty pounds given by the act of 1729, for marrying his infant son without publication of banns.

The court charged the jury that so much of the acts of assembly of 1700 and 1729, as requires the publication of banns is not obsolete: that they ought to be satisfied from the evi-

dence that the banns were not published before they found for the plaintiff, but that this was a negative which in the absence of all evidence of an affirmative character might be presumed: that it was not material that the minor was dependent for support on his parent: that he would be liable although the minor was not so dependent; and although he lived away from his father and supported himself, if, in other respects he was liable: that they might find for the defendant if they believed the plaintiff was not grieved by the marriage, but that the father might be presumed to be grieved in the absence of evidence to the contrary.

The court also charged, although no exception was taken thereto, that if the minor were accompanied by friends or witnesses of the ceremony of marriage, that notwithstanding the presence of the witnesses, the defendant would be liable if otherwise liable.

To this charge the defendant excepted, and the cause was now argued by

V. L. Bradford, for the plaintiff in error, who contended that the acts of assembly of 1700 and 1729, requiring publication of banns were obsolete and inapplicable to the present times. Marriage is only a civil contract which may be inferred from cohabitation or acknowledgment of the parties. No formal solemnization of it is required. 4 Johns. 51. The burthen of proof lay upon the plaintiff to show that there was no publication of banns. *The general rule is, that a party is not compelled to prove a negative: but the [*210] exception is as well settled as the rule, that where the negative involves a criminal omission by the party, and consequently where the law by virtue of its general principle presumes his innocence, the affirmative of the fact is also presumed. 1 Stark. Ev. 378; 18 Johns. 347. And here the undertaking to marry without the publication of banns is a penal act. He argued further, that it was material in order for the parent to recover, that the minor should be dependent on him for support. If, as in the case at bar, he lived away from the parent and maintained himself, there was no loss of service: and

actual loss is the ground of an action by a parent. He cannot recover in respect of the mere parental right, or for the injury merely to his parental feelings. During the continuance of the military tenures, an action lay for marrying his son and heir without his consent, because he lost the value of the marriage. Actual loss is therefore the ground of a civil action by the parent. 3 Bla. Com. 140; and though the act of assembly gives the parent a remedy against the person joining in marriage, it does not dispense with what the common law makes essential to the existence of the action. Besides it ought to have been affirmatively proved and could not be presumed that the father was grieved, or received any injury.

Grinnell, contra, was directed to confine himself to the second specification of error.

He contended that the difficulty of proving in this case a negative was so great as to make it impossible for the plaintiff to prove it. In general a party is not required to prove a negative, but it lies on the other side to prove the affirmative of what he insists. Matter in defence of the action need not be stated but ought to be shown by the opposite party. 1 Chitty's Plead. 227; Com. Dig. Plead. c. 81. The averment "without publication of banns" in the declaration, gives notice to the defendant to be prepared to show that there was such a publication, and is therefore for his benefit. The defendant pleaded the general issue. If, however, he could have been required to plead specially, he must have averred and proved the publication of banns. The omission of the plea cannot make any difference. In actions for penalties on the game laws, the want of the several qualifications must be averred in the narr., and yet the plaintiff is not required to prove the negative averment. 1 Stark. Ev. 376; 2 Ib. 626. Where a party before a justice admits the trading, he must prove that he had license. 1 Stark. Ev. 376; Rex *v.* Smith, 3 Burr. 1475.

Nor does this case come within the exception urged on the other side where the negative involves a criminal omission by the party. In the case of Lord Halifax and the East India Company referred to in 1 Stark. Ev. 378, the persons con-

cerned in putting the combustible matter on board the ship were criminally liable and punishable for a misdemeanor at the least. In the present case a criminal *omission cannot be pretended—as there is no law requiring or [*211] compelling the defendant to solemnize a marriage. So in Monk and Butler, 1 Rol. Rep. 83, where the court put the defendant to prove that the plaintiff had not read the thirty-nine articles, although a negative. It is apprehended that in all cases of exception to the general rule that a party is not to be called to prove a negative, there is a criminal omission, or an omission by an officer of an act to be done by himself and not by others (as the publication of banns) who is supposed to do his duty until the contrary be proved. Here there is nothing official in the clerical character of the defendant, as marriage being a civil contract, it need not be performed before a clergyman or a magistrate.

The plaintiff having proved the fact of the marriage, it was *prima facie* sufficient to throw the burthen on the defendant to show that he was qualified. The court told the jury that before they found for the plaintiff, they must be satisfied from the evidence that the banns of marriage had never been published. In this surely there is nothing illegal or of which the defendant had cause to complain. The jury found for the plaintiff, thus, it is supposed, declaring that they were satisfied from the evidence that there had not been a publication of banns. If they were wrong the defendant might have had a remedy in the court below.

The opinion of the court was delivered by

Gibson, C. J.—The notion that the acts of 1700, and 1729–30, are obsolete in their provisions for publication of banns, is a novel one. The provisions were not introduced to serve a particular time or occasion; and they are consequently the law of our day, though capable, as held in Radebaugh *v.* Sanks, of being satisfied by less than the certificate of consent appointed as the statutory substitute for publication. It was held in that case, that the penalty is not incurred by performance of the marriage ceremony without publication or certifi-

cate, where the acts and declarations of the plaintiff have been such as may have led the defendant to believe that the marriage was desired by him. But where there was not actual consent, or such indications of it as would make an averment of dissent a fraud, which it is not the policy of the statute to encourage, it never has been doubted that its requirements must have been complied with in order to save the penalty, though not to legalize the marriage.

The next point, however, was erroneously ruled by charging that, in the absence of proof to the contrary, the jury might presume that the banns were not published according to the statute. The general rule undoubtedly is, to dispense with proof of a negative, the burthen being cast on him who asserts the affirmative. But to this there are two undoubted excep-

[*212] tions; the first were the truth of the allegation *is peculiarly within the knowledge of him who denies— and the second, which seems to be the case at the bar, where the denial imputes a criminal omission by the party to be charged, and there the legal presumption of innocence stands for proof till it is rebutted. The authorities are collected in 1 Starkie, Ev. 363; to which Senser *v.* Bower, 1 Penn. R. 450, may be added. And the presumption operates with peculiar propriety, where the negative is a constituent part of the offence, instead of its opposite being a ground of exemption, as it preserves the maxim, that the accused is to be held innocent till proved guilty, from being inverted. The case of a penal action for sporting without the requisite qualification, though apparently irreconcilable to the spirit of these exceptions, is not so in fact, because the qualification to keep a gun, operating by way of exception out of the general implication of criminality, from an act which, if done without a personal license, would be unlawful, must be shown by the accused as a special justification, though it would be otherwise if the want of it, as here, were a constituent part of the offence. The distinction implied by these instances is undoubtedly a subtile one, and it is not easy to define its properties with certainty or precision; but they are all resolvable into this: where the prohibition is general with an exception in favour of persons,

a party who claims the benefit of the exception must bring himself within it; but where the prohibition is special in reference to the circumstances, the party alleging criminality must show the existence of those circumstances, even of a negative quality, on which alone it can depend. But though the burthen of negative proof rests on the plaintiff, in the case at the bar; want of publication may be shown by slight circumstances, such as suddenness and privacy in the concoction of the marriage.

The second and third points involve the supposed necessity of service and dependence upon the plaintiff, as the foundation of the action. Were this penalty, like damages for seduction, demandable but on the relation of master and servant, there might be colour for this part of the defence. But even the action on the case has been sustained, where the daughter was in the employment of another, the father having retained the right to control her person. The action here, however, is founded on the relation of parent and child, which may survive a state of service and dependence; for the remission of a father's right to the earnings of his child, though undoubtedly binding, is not an abandonment of his parental rights or duties in respect to marriage, or settlement of the child in life, and an obstruction of these is the very injury in requital of which the penalty is provided: as was recently determined in Donaghue *v.* Dougherty, *supra*, 124.

In that case, too, it was determined that the law implies injury to the parent, without proof of actual damage; and that where the *requisitions of the statute have not been complied with, the officiating party proceeds at his peril. [*213]

Judgment reversed, and a *venire de novo* awarded.

Cited by Counsel, 7 W. & S. 363; 1 Barr, 431.

[PHILADELPHIA, APRIL 16, 1835.]

Earnest and Others, Administrators of Earnest, *against* Earnest and Others.

IN ERROR.

In an action by the grandchildren of an intestate against the administrator to recover a distributive share of the estate accruing to them in right of their parent, the defendant may set off a debt due by the parent of the plaintiffs to the intestate.

Therefore, where a promissory note has been given by the child to the parent, it is immaterial whether it is evidence of a debt, or is to be taken as an advancement, so far as respects its admissibility in evidence, in a suit brought by the grandchildren against the administrators of their grandparent, for a distributive share of the estate.

The question of advancement may be settled in the Orphans' Court, but it must not necessarily be settled there.

Of advancements, under the laws of Pennsylvania, and the proper mode of ascertaining their amount and enforcing their operation.

WRIT of error to the Court of Common Pleas of *Montgomery* county, in an action brought by the defendants in error, who were the minor children of Henry Earnest, deceased, who was a son of Baltzer Earnest, deceased, by their guardian, John Huston, against the plaintiffs in error, who were the administrators of Baltzer Earnest, to recover a distributive share of their grandfather's estate.

The declaration set forth that Baltzer Earnest died intestate on the 20th September, 1829, leaving five children and three grandchildren, to wit, Eli, Mary, and Elizabeth, the plaintiffs, who were the children of Henry, one of the sons of the said Baltzer Earnest, which Henry was at that time deceased; that letters of administration on the estate of the said Baltzer Earnest, were granted to the defendants, who, by virtue of the same, possessed themselves of the real and personal estate of the deceased; that on the 15th of October, 1830, the said administrators settled an account of their administration of the said estate, in the register's office of the said county, by which it appeared that there was at that time in the hands of

the said administrators the sum of six thousand one hundred and forty-three dollars and thirty-four cents beyond all debts, funeral and other expenses. By reason whereof, the said administrators became *liable to pay to the said Eli, Mary, and Elizabeth, children of the said Henry, who [*214] was one of the children and heirs at law of the said Baltzer, the sum of ten hundred and twenty-three dollars and eighty-nine cents, being one-sixth part of the said six thousand one hundred and forty-three dollars and thirty-four cents, and being so liable, &c.

Second count, for money had and received.

The defendants pleaded *non assumpserunt* and payment.

The defendants' counsel gave the following notice of special matter, viz.:

"Take notice that the above-named defendants on the trial of this cause will give in evidence: That the above-named Baltzer Earnest, deceased, in his lifetime, lent and advanced to or paid, laid out and expended for the above-named Henry Earnest, deceased, his son, and at his request, sundry sums of money, amounting to seven hundred and thirteen dollars and sixty-three cents and upwards, to wit, two hundred and fifty dollars on the 1st of April, 1823, one hundred and thirty dollars more on the 10th of May, 1823, two hundred and fourteen dollars and cents more on the day of 1823; six dollars and forty-two cents more on the 12th of March, 1824; thirteen dollars and ninety-three cents more on the 24th of December, 1824; twenty dollars more on the day of , 1828; seventy-nine dollars and twenty-eight cents more on the 9th of March, 1829, and sundry other sums at sundry other times. That the said sums of money so as aforesaid lent and advanced to, or paid, laid out, and expended for the said Henry Earnest by the said Baltzer Earnest, were at the decease of the said Baltzer to be accounted for by the said Henry, and charged to and deducted from the part or share of the estate of the said Baltzer Earnest, to which the said Henry or his legal representatives or heirs might be entitled at the death of his said father, Baltzer Earnest.

"That the said sums of money were not paid nor accounted

for by the said Henry Earnest at the death of his said father, nor at the commencement of this suit.

"That the said administrators laid out and expended for and on account of the said minor children's estate, the sum of ten dollars, and that the said defendants will set off the said ten dollars, and so much of the aforesaid sum of seven hundred and thirteen dollars and sixty-three cents and upwards, so advanced and paid to and for the said Henry as aforesaid, and the interest which accrued thereon to the decease of the said Baltzer Earnest, against the demand of the said plaintiffs as will be sufficient to satisfy such demand."

On the trial of the cause in the court below, it was admitted that the plaintiffs were the minor children of Henry Earnest, deceased, and that he was a son of Baltzer Earnest, deceased. That Henry Earnest died in August, 1828, leaving issue the above-named minor children, and that Henry Huston was duly [*215] appointed their guardian *on the 23d November, 1829. That the said Baltzer Earnest, their grandfather, died intestate on the 8th of September, 1829, leaving a widow, who is still living, and issue five children, and the above-named grandchildren, the issue of his said son Henry Earnest, deceased.

The plaintiffs gave in evidence a settlement of the personal estate of the said Baltzer Earnest, deceased, made by the said administrators in the register's office on the 15th of October, 1830, and duly confirmed by the Orphans' Court on the 17th of November, 1830, by which there appeared to be a balance of six thousand one hundred and forty-three dollars and thirty-four cents due the estate of the said Baltzer Earnest in the hands of the said administrators, making each distributive share (after deducting the widow's share or third) six hundred and eighty-two dollars and fifty-nine cents.

The defendants' counsel then read the notice of special matter and afterwards examined as a witness Catherine Earnest, who testified as follows, viz.: "The said Henry Earnest the son, came to his father, Baltzer Earnest, in the spring of 1823, and requested his father to let him have two hundred and fourteen dollars to pay a debt Mr. Wentz had against him, saying he

was willing and intending it should come against his share of his father's estate after his father's death. His father agreed to advance the money to Henry. Afterwards Henry came to his father again and asked him to advance him two hundred and fifty dollars more to pay another debt. His father advanced this sum to Henry and took his note for the same, dated the 1st of April, 1823. Henry afterwards came again and asked his father to advance him one hundred and thirty dollars more to pay another debt, which the father advanced to Henry and took his note for this sum, dated the 10th of May, 1823. Baltzer Earnest told his son Henry when he paid him the two hundred and fourteen dollars, he never expected to receive it in his lifetime, and that it was to go against Henry's share of the estate. He told Henry he must not expect to spend the other children's money: that these advancements must be against his share of the father's estate, at his death. I remember it was in the spring of 1823, when Henry wanted the two hundred and fourteen dollars to pay Mr. Wentz. I recollect Henry failed at that time and sold out, and was not able to pay his debts. He was there twice about the two hundred and fourteen dollars. Henry called on his father to pay a debt of Jacob Redifer; two bills of about twenty dollars, one in March, 1824, and one in December, 1824. His father said he could pay these bills, but it must go against Henry's share of the estate, and Henry was so agreed and his father paid them. In 1827, Henry Earnest and Jesse Earnest came to their father's two different times, and Henry requested his father to pay Jesse Earnest seventy-nine dollars and twenty-eight cents, the amount of a note he had against Henry. The first time the father said he did not know whether he would do *it or not; he had advanced so much to Henry, he thought Henry would spend all his share before his [*216] father's death. The second time they called the father said he would answer the note, but it should come against Henry's share of the father's estate after his death. Henry was agreed to it that it should, and it was paid by Baltzer Earnest the father, in the spring of 1829, after Henry's death. The second time they called was in May or June, 1827. The note was not

assigned to Baltzer Earnest. Henry Earnest and Dr. Jones came to Henry's father, and Henry requested his father to pay a debt of twenty dollars to Dr. Jones. His father told Henry he would pay it, but it should come against his share of the father's estate. Henry agreed to it, and his father afterwards paid this to Dr. Jones in May, 1828. Henry was upwards of thirty years old at the time of his death."

Jacob Redifer, a witness on the part of the defendants, testified as follows: "Baltzer Earnest paid me two bills I had against his son Henry Earnest. He paid me one bill of six dollars and forty-two cents, the 12th of March, 1824; and the other of thirteen dollars and ninety-three cents, he paid me the 24th of December, 1824."

The defendant's counsel then offered in evidence, a promissory note from the said Henry Earnest, to the said Baltzer Earnest for two hundred and fifty dollars, dated the 1st of April, 1823, (the same above mentioned in Catherine Earnest's testimony,) of which the following is a copy:

"I promise to pay, or cause to be paid unto Baltzer Earnest, senior, or order, the just and full sum of two hundred and fifty dollars, in six months after this date, with interest at three per cent., until paid, it being for value received, as witness my hand this 1st day of April, 1823.

$250. HENRY EARNEST, [L. S.]"

"Witness present,
WILLIAM EARNEST."

And, also, a certain other promissory note from said Henry Earnest to Baltzer Earnest, for one hundred and thirty dollars, dated May 10th, 1823. (The same above mentioned by Catherine Earnest), of which the following is a copy:

"May 10th, 1823. Twelve months after date I promise to pay to Baltzer Earnest, senior, or order, the just sum of one hundred and thirty dollars with interest at five per cent., with-

out defalcation for value received; witness my hand and seal the day and date above mentioned.

\$130. HENRY EARNEST, [L. S.]"

"Witness present,

WILLIAM EARNEST."

The defendants' counsel then offered to prove by Catherine Earnest, that the said Henry Earnest, the son, called on his father Baltzer *Earnest, the 1st of April, 1823, and asked his father to advance him two hundred and fifty [*217] dollars to pay a debt. The father told Henry he would advance him the money, but that it must come against his share of the father's estate at his death: that Henry should not spend his share twice, and should not spend the other children's money: Henry said he expected that, and was agreed to it, and was willing it should come against his share at his father's death. Baltzer Earnest then advanced Henry two hundred and fifty dollars, and Henry gave his father the above-mentioned promissory note for two hundred and fifty dollars: that Henry Earnest called on his father again the 10th of May, 1823, and requested his father to advance one hundred and thirty dollars more to pay another debt. The father told Henry he would advance this sum also, but it must also come against his share of his father's estate, and that he should not spend his share twice, nor spend the other children's money. Henry answered he expected and was agreed to it. His father then advanced Henry one hundred and thirty dollars more, and Henry then gave his father the above-mentioned note for one hundred and thirty dollars, dated May 10th, 1823: That immediately after advancing said respective sums of two hundred and fifty dollars and one hundred and thirty dollars, and taking the said notes therefor, and at other times afterwards, when Henry would want his father to advance him more money, his father told his son Henry that the above-mentioned sums of two hundred and fifty dollars and one hundred and thirty dollars were towards Henry's share of his father's estate, and to come against his share at his father's death: That these sums were not to be received from Henry in

the father's lifetime, but to come against Henry's share at his death. Henry always replied he expected that, and was agreed that these sums should come against his share at his father's death.

The plaintiff's counsel objected to the admission of the said notes, and testimony of Catherine Earnest, in evidence, contending that they were no evidence of advancements by the said Baltzer Earnest, to his son Henry.

The court was of opinion that the said notes and testimony of Catherine Earnest should not be admitted in evidence, and that the said sums of two hundred and fifty dollars and one hundred and thirty dollars were not advancements to the said Henry Earnest, and accordingly rejected the evidence. Upon which the defendants' counsel tendered a bill of exceptions, which was sealed by the court.

The jury found a verdict for the plaintiffs for four hundred and seventy-nine dollars and two cents.

The errors assigned in this court were—

1st. The court below erred in refusing to permit the defendants to give in evidence the note from Henry Earnest to Baltzer Earnest for two hundred and fifty dollars, dated 1st of April, [*218] 1823, and in *overruling the testimony proposed to be given by Catherine Earnest in relation to the same, as set forth in the bill of exceptions.

2d. The court below erred in refusing to permit the defendants to give in evidence the note from Henry Earnest, to Baltzer Earnest, for one hundred and thirty dollars, dated the 10th of May, 1823, and in overruling the testimony proposed to be given by Catherine Earnest, in relation to the same, as set forth in the bill of exceptions.

The cause was argued in this court by *Sterigere* for the plaintiffs in error, and by

J. Sergeant for the defendants in error.

Rawle, Jr., for the plaintiffs in error, who was to have replied, was relieved by the court, whose opinion was delivered by

Rogers, J.—The evidence which forms the ground-work

of the defendants' exceptions may be classed under two heads:—

1st. The rejection of the promissory notes given by Henry Earnest to Baltzer Earnest, and

2d. The refusal to admit the notes with the explanatory evidence of Catherine Earnest.

As to the first point, it seems to have been conceded on the argument in the court below, that a debt due by a son to a father, cannot be set off in a suit brought by the grandchildren for a distributive share of the estate of the grandfather. Now, it appears to us, that whether the notes were evidence of a debt, or are to be taken as an advancement, it is immaterial, so far as their inadmissibility in evidence is concerned. It is clear, that if Henry Earnest, the father of the plaintiffs, had been alive and brought suit for a distributive share of the estate, the administrators could have availed themselves of the defence, and it is not perceived in what respects the plaintiffs are in a better situation. They claim not as next of kin, but by right of representation; for by the third section of the act of the 19th of April, 1794, such issue are allowed to inherit such share only, as would have descended to the parent, if such parent had been living. And the 9th section, which relates to advancement, contains this exception; that when the issue to take shall not be of equal degree to the person dying, seized or possessed, the several descendants taking by way of representation, shall inherit such share only, as would have descended or been distributed, to his, her, or their parent or ancestor, if such parent or ancestor had been then living.

There has been no direct decision on the effect of the above section in this state, but on the construction of the English statutes of distribution, which are in substance the same, many points have been ruled, and to these it will be only necessary briefly to advert. The cases are classed under three heads.

1st. Where none of the intestate's children are dead.

*2d. Where the intestate's children are all dead, all of them having left children. [*219]

3d. Where some of the intestate's children are living, and some dead, and such as are dead have left children.

In the two first classes the parties are said to take *per capita*, or in other words, equal shares in their own rights; but in the last case, the grandchildren take *per stirpes*, that is to say, not in their own right, but by representation.

This case is one of the last description, and as the plaintiffs entitle themselves as representing their parent only, they must take the share which descended to them, with all the burden with which it would have been charged, had their parent been living.

The primary object of the act is equality in the different branches, springing from the common ancestor: and this effect is produced by placing the grandchildren so far as the other heirs are concerned, but no further, in the place of their respective parents. It has been decided in Proud *v.* Turner, 2 P. Wms. 560, that if a child who has received any advancement from his father, shall die in his father's lifetime, leaving children, such children shall not be admitted to their father's distributive share, unless they bring in his advancements, since as his representatives, they would have no better claim than he would have had, if living. As the issue stands in the place and stead of the father in cases of an advancement, there could be no reason why they should be in a better condition than their father would have been, if he had claimed his distributive share when largely indebted to the estate, of which he desired to participate. 3 Bacon's Ab. 75; 1 Equity Cases Abridged, 249; Walsh *v.* Walsh, Precedents in Chan. 54; Toller, 374, 378.

The disposition thus made of the first point, makes the second of but little importance. For the administrators admit that these notes although *prima facia* evidence of a debt, were intended as an advancement: and this it is no longer the interest of the plaintiffs to deny, for it makes this difference to them, that as a debt, they must account for principal and interest; but as an advancement for principal only.

But it is said the question of advancement, can only be settled in the Orphans' Court. That it may be settled in that court, there is no doubt; but that it must, is not so clear. An administration account, is an exhibit of the estate of the in-

testate of which an advancement is properly no part. A child to whom an advancement has been made, cannot be called on to supply a deficiency of the estate for the benefit of either creditors, or legatees, for that is no part of the assets of the estate. The act does not divest the child of any property which has been given to him, however unequal it may have been, or how much soever it may exceed the residue; he may if he pleases, keep it all. If he be not contented, but would have more, then he must bring what he has before received, as the law expresses it, into hotch pot, that is, into the general mass of the *property to be divided. But a child is not compelled to bring the amount of his advancement [*220] into hotch pot, until the balance has been struck, and the amount of the surplus to be distributed, has been ascertained. When the value of the estate is known, if he is not satisfied with what he has received, he must account for the amount he had already been advanced; when the balance is struck and distribution of the surplus is to be made, then, and not till then, it becomes important to ascertain the amount which each of the heirs or distributees has received, either from the administrator or the ancestor.

Distribution is usually made either under the 13th or 16th section of the act of 1794, that is, either with or without an application to the Orphans' Court, taking a bond with sufficient securities, to indemnify the administrator against any debts that might afterwards be recovered against the estate. When an application is made to the Orphans' Court, they no doubt would have power to inquire into and settle the amount of the advancements, and to make a special decree ascertaining the respective rights of each, and the persons to whom distribution should be made. But it has not been usual to make a special decree, but the practice with some exceptions in the Orphans' Court, has been to make a general decree, that the balance be distributed according to law, leaving it to the administrator, taking the security prescribed by the act, to pay to each person entitled, the amount of his distributive share, or in case of difficulty, to settle the right of the respective heirs in a suit in the common law courts. Where the advance-

ment is of a certain value, as of a sum of money, either the administrator or the Orphans' Court, can settle the distribution without difficulty; when it is uncertain, as a tract of land, for example, a jury would seem to be the appropriate tribunal. In some cases it must be admitted, a settlement in the Orphans' Court has an advantage over a common law tribunal, as the Orphans' Court acting as a court of equity, have the power to bring all the parties before them, and can settle the controversy by one decree, as for example, when several of the children have been advanced, and a controversy exists as to the amount or value of the advancement of one or all of them, the Orphans' Court can and ought to take jurisdiction of the cause. When some of the heirs reside out of the state, the manner of proceeding is prescribed by the act of the 13th of March, 1815. But where all the heirs reside in the state, there is no statutory regulation. The inconveniences which caused the enactment do not exist here, and in such cases the manner of proceeding prescribed by the act of 1815, may furnish a safe rule.

In the latter case, the amount which each had been advanced, may be readily ascertained by application to the parties, or by application to the Orphans' Court, with notice to the heirs. But this can be necessary only where the administrator has notice, that *some of the heirs have been [*221] advanced, for when he makes distribution, either with or without the sanction of the court, but without notice of any advancement made by the ancestor, he should be protected. And this would seem to be equitable, for all that an administrator has a right to require from the distributees, under the act of 1794, is an indemnity against debts that might be afterwards recovered from the estate.

Judgment reversed, and a *venire de novo* awarded.

Cited by Counsel, 2 Wh. 48; 6 W. 310; 10 W. 167; 6 W. & S. 196; 6 Barr, 458.

Cited by the Court, 4 Wh. 137; 7 Barr, 321; 7 H. 491; 1 S. 497; 7 S. 181, 183.

Approved in 9 W. 353; 24 S. 123.

In 5 W 95, there was a decision contrary to this one, but the later cases have overruled that case and established the doctrine of Earnest *v.* Earnest.

[Earnest and others, Adm., *v.* Earnest and others.]

The Act of 1833 has received the same construction, and the Act of April 27th. 1855, has altered the law as to collaterals only. It is only where grandchildren take through their parents that they take subject to their liabilities; therefore in case all the children of the intestate are dead, the grandchildren take directly from their grandfather and their shares are not subject to deductions on account of advancements made to their fathers: 24 S. 123. The later decisions hold that the Orphans' Court has exclusive jurisdiction of cases of advancement, and consequently Earnest *v.* Earnest is overruled on that point: 7 H. 491; 7 S. 181, 184; but in one of the later cases the question arose on a case stated, and the court retained jurisdiction and affirmed the decision given at Nisi Prius: 7 S. 184.

[PHILADELPHIA, APRIL 16, 1835.]

Thomas *against* Jenks.

Parry *against* The Same.

APPEAL.

An assignment by partners of partnership effects for the benefit of creditors, contained a condition that the creditors should execute by a day certain, a release of their claims to the assignors individually and as co-partners. Both the partners had separate property. Held, that the assignment was fraudulent and void.

THIS was an appeal by Joseph S. Sloan, assignee of Jenks & Co., from the decision of the Court of Common Pleas of *Bucks* county, awarding to the plaintiffs the money in the hands of the sheriff, made under executions against Jenks & Co.

By indenture dated the 7th day of February, A. D. 1833, William P. Jenks and William Maris, trading as William P. Jenks & Co., made an assignment to Sloan, of all the machinery, stock, goods, chattels, debts, moneys, effects, messuages, lands and tenements, book debts, accounts, claims, and all other things whatsoever of the said William P. Jenks & Co., as well real as personal, in trust to pay creditors in the manner therein set forth.

The assignment contained the following proviso: provided always, nevertheless, that no creditor shall be entitled to any

benefit under the assignment, who shall not on or before the 6th day of March next, at 12 o'clock at noon on that day, in due form of law, execute a full and sufficient release of and from their respective claims to the said William P. Jenks and William Maris, individually and as co-partners. Fourthly, to restore and repay to the said William P. Jenks and William Maris, the residue of the estate and effects or the proceeds thereof remaining in the hands of the said Joseph S. [*222] *Sloan, after payment and discharge and indemnity of the aforesaid claims in the manner and order aforesaid.

Releases were accordingly signed by a number of the creditors on the 5th day of March, 1833.

On the 8th of April, 1833, Thomas and Parry issued writs of *fieri facias.*

On the 11th day of April, 1833, the sheriff levied under the plaintiffs' executions on the property, the right to the proceeds of which was the subject of the present controversy.

Sloan issued a foreign attachment against William P. Jenks & Co., and directed the sheriff to attach the machinery included in the assignment.

Sharswood (*J. R. Ingersoll* was with him) for the appellant.

The first question is, whether an assignment of partnership property for the benefit of partnership creditors, and stipulating for a general release, is *per se* fraudulent? It is to be taken for granted, that this transaction was fair in fact, as nothing appears to the contrary. The right of a debtor in failing circumstances to prefer one creditor to another cannot now be doubted. Hendricks *v.* Robinson, 2 Johns. Ch. Rep. 283; Wilt *v.* Franklin, 1 Binney, 502. Nor can it be doubted that he may make a special assignment of part of his property for the benefit of particular creditors; nor is the mode of designation material. The case of Lewkner *v.* Freeman, Finch, 105, was a special assignment to pay scheduled debts and such other debts as the debtor within a certain time should appoint. The stipulation for a release has been recognized as valid in general assignments. Lippincott *v.* Barker, 2 Binn. 174, Pierpont *v.* Graham, 4 Wash. C. C. Rep. 232. It is worthy

of remark that in Pierpont *v.* Graham, the assignment was as in our case, an assignment of partnership property only, and stipulated for a general release. Sheepshanks *v.* Cohen, 14 Serg. & Rawle, 35, appears also to have been an assignment of that character. But Judge Story has expressly decided this point in our favour in Halsey *v.* Whitney *et al.*, 4 Mason, 218, and in a very lucid and able opinion examined and sifted most of the cases. The only thing to the contrary that can be found in any of the books is a mere *obiter dictum* and a very loose one of Chancellor Kent in Seaving *v.* Brinckerhoff, 5 Johns. Ch. Rep. 329, which turned upon an entirely different point, and where though he viewed such a stipulation as unreasonable and strong evidence of fraud in fact, he does not say it is a fraud *per se*.

Here was no resulting trust. The separate property continued open in the execution of the dissenting creditors. It did not pass by the assignment. All the cases on this subject are where the creditor is obliged to break down the assignment in order to get at the reserved fund. M'Alister *v.* Marshall, 6 Binn. 338. It results from the right of the debtor to prefer that he may offer terms, and *provided he does not withdraw any part of his property from the process of his creditors, for his own benefit, the transaction is unimpeachable. [*223]

The second question is, whether the executions in these cases were not laid too late? It appears that they were levied subsequent to the signature of the release by a large number of creditors. By so doing they had in effect accepted the fund assigned in full satisfaction of their respective debts, and in equity it had become theirs. Brown *v.* Mintum *et al.*, 2 Gallison, 457, was an assignment of particular property for the benefit of certain creditors enumerated in a schedule; and it was held that they acquired by their assent not only an equitable but a legal right to the fund. That such an assignment as this is capable of confirmation is shown by many cases. Austin *v.* Bell, 20 Johns. 442; Murray *v.* Riggs, 15 Johns. 571; Hatch *v.* Smith, 5 Mass. 42; Bradway's Estate, Ashmead, 212; Marbury *v.* Brooks, 7 Wheat. 556; Brooks *v.*

Marbury, 11 Wheat. 78. In Adlum *v.* Yard, 1 Rawle, 163, there was no stipulation for a release, and it was decided by this court, that if a creditor take a dividend under a fraudulent assignment, he cannot afterwards question its validity. A release under the hand and seal of the creditor is certainly a more solemn and direct confirmation than the mere receipt of a dividend. "It has been conceded," says Tilghman, C. J., in Lippincott *v.* Barber, 2 Binn. 181, "that if any of the creditors had given a release before the execution was levied, such creditor would have been entitled to a preference. Indeed, that case when examined will be found to be a case in point; for the court there carefully avoid deciding the question whether the assignment was valid; but defeated the execution of the dissenting creditor on the ground that it was not laid until after the assignment had been accepted by certain of the creditors. So it has been held in the Supreme Court of the United States, that in a fraudulent assignment, the assignee is entitled to retain for his own *bona fide* debt, for his equity is equal to the other creditors, and he has the possession. Beach *v.* Viles, 2 Peters' S. C. Rep. 675.

Ross, contra.

The assignment is void.—

1. Because it contains a resulting trust to the debtor. The court intimated that this point had been decided in favour of the resulting trust.

2. The time fixed for a release was unreasonably short only thirty days. Pierpont *v.* Graham, 4 Wash. C. C. R. 237.

3. Because the assignment is only of partnership property and yet stipulates for a release of their separate estates. An assignment stipulating for an exemption of part of the property is void as *tending to delay, hinder, and defraud creditors. The assignors here had individual property. All the debtor's property must pass in order shown to render the transaction valid. The courts have of late a disposition rather to restrict and extend these voluntary assignments.

[*224]

Mr. Ross then went into an examination of the cases, citing

M'Alister *v.* Marshall, 6 Binn. 338; Passmore *v.* Eldridge, 12 Serg. & Rawle, 198; Sheepshanks *v.* Cohn, 14 Serg. & Rawle, 35; Wilson *v.* Kneppley, 10 Serg. & Rawle, 439; Johnson *v.* Harvey, 9 Serg. & Rawle, 123; 2 Penn. Rep. 92; Adlum *v.* Yard, 1 Rawle, 163; M'Clury *v.* Lecky, 3 Penn. R. 83; Leaving *v.* Brinkerhoff, 5 Johns. C. R. 329; Austin *v.* Bell, 20 Johns. 450.

4. The possession of the property must pass to the assignee. Hower *v.* Geesaman, 17 Serg. & Rawle, 251; Shaw *v.* Levy, 17 Serg. & Rawle, 101. The attachment was conclusive evidence that the possession did not pass. There is no evidence that the assignee complied with the requisites of the act of 1832, as to schedule, bond, &c. Though the omission to comply with these requisites does not vitiate the assignment, it is evidence that the assignee never assented.

Randall, on the same side, was relieved by the court.

The opinion of the court was delivered by

Gibson, C. J.—It is difficult, at a glance, to reconcile the mind to the decisions in support of these conditional assignments in any case; or comprehend how a conveyance which puts the debtor's property beyond his creditor's reach, except on terms prescribed by himself, can be anything else than an act to "delay, hinder, and defraud" within the purview of the 13 Elizabeth. On the other hand, where the object is in truth distribution and not hindrance, the supervening delay being but incidental to the process, it is not easy to point out a defect in the argument on which they have been sustained. The basis of it is the admitted right which every debtor in failing circumstances has, to prefer one creditor to another: for as an assignment on valuable consideration and for a lawful purpose as payment of debts is, necessarily passes the property out of the debtor, the consequence indicated as apparently objectionable, is unavoidable though there be even an express reservation of a trust for the debtor in the unconsumed surplus, which is no more than the law would imply without it, such surplus being liable in his hands as if it had never passed from him.

The difficulty is to understand how he may lawfully manage his right to give a preference in such a way as to secure an advantage to himself in the release of his person and future earnings. And the solution of it is found in the arbitrary control [*225] over the order of payment allowed *him by the common law, and not restrained by the 13 Elizabeth; which, suffering him to postpone any creditor to the rest, makes participation of the fund before those he may choose to prefer are served, not so much matter of right as of favour. To let a creditor in among the first, therefore, though on condition that he release the unpaid residue of his debt, may be to do him a favour instead of a wrong, which may consequently be extended to him on terms, or not at all. Having an unquestionable power of preference of which he is the absolute master, it follows that he may set his price on it provided it be not a reservation of part of the effects for himself, or anything that would carry his power beyond mere preference. Such is the unavoidable, if not the just, effect of suffering a debtor to distribute the wreck of his fortune among his creditors according to his pleasure; and it is the repugnance of the mind to inequality of satisfaction which has induced legislators to extirpate the root of it in bankruptcy and insolvency, by substituting for it a process of distribution paramount to the will of the debtor. To expunge the principle of preference from a bankrupt law made by the debtor for himself, so long as he is permitted to legislate for himself, would require the force of a statute: and I am unable to say that the decisions which sustained these assignments originally, though coupled with a stipulation for prospective exemption, were unfounded in the principles of the common law: certainly it is now too late to question their authority. The legality of such a stipulation seems not to have been contested in Burd *v.* Smith, 4 Dallas, 76. Indeed the reasons of the judges are so indistinctly set forth in that case, and the discrepance of their views is so remarkable, as to render it of little value as a precedent for anything. From Lippincott *v.* Barker, 2 Binney, 174, in which the point was expressly ruled, to the present time, the occurrence in practice of a countless number of such assignments—many of

them recognized by judicial decision—and the immense amount of property held by the title, would make it dangerous even to pause as to the validity of it.

But the principle of preference on terms of compromise, is not to be indulged so far as to legalize the reservation of a portion of the effects for the debtor. In M'Allister *v.* Marshall, 6 Binney, 338, it was held that an assignment of all the effects upon a stipulation to re-convey a part for the benefit of the debtor's family, is void for the part to be re-conveyed. It was not necessary to pronounce it void for the whole as no more than the part re-conveyed was in contest; but nothing is clearer than that a contract fraudulent in part by the provisions of a statute, whatever be the abstract effect of fraud in other cases, is void in the whole. The principle has since been applied in Hyslop *v.* Clark, 14 Johns, 465, to the very case of an assignment in trust for payment of debts. Under the 13 Elizabeth, then, what is the difference between a conveyance of the whole on terms of returning a part, and a conveyance of a part in the first *instance? Certainly but a difference of form, and not a difference in principle or effect. In either form the transaction would give the debtor the same advantage at the expense of the creditors. A debtor, for example, who has enough to pay seventy-five per cent. all round, assigns two-thirds of his effects, or to the value of fifty per cent. of his debts, in trust to pay those who shall release by a day certain; and retains to the value of twenty-five per cent. With the alternative of choosing between these two funds put before him, what would a creditor probably do? If two-thirds in value, and no more, should happen to prefer the trust fund, they would get seventy-five per cent.; their just proportion of the whole effects; while the others would get as much from the portion in the hands of the debtor; and in that conjuncture any particular choice would be indifferent to him. But if less than two-thirds should accept the terms proffered in the assignment, they would get more than their just proportion, and those who rejected them would get less. If, however, all should accept, then all would get at the least fifty per cent., while if all [*226]

should reject, they would get but half as much. The probability therefore is that a great majority—perhaps all—would elect the trust fund; and that would leave a surplus to the debtor. Now it must be obvious that an exercise of the right of preference, which might produce that result, cannot be a legitimate one. The creditors are entitled to the benefit of the whole estate, of which they are not to be deprived by an arrangement which would impose on them the necessity of resorting to a part of it in exclusion of the rest. The very imposition of a choice which might prove unfortunate, would be an exposure of them to a peril which they are not bound to encounter. An assignment, therefore, that would present but a part of the effects to the creditors and refuse the rest, is necessarily fraudulent, inasmuch as it might be a means to extort an unfair advantage. But why, it may be demanded, shall not the debtor be suffered to stipulate for a part of the property as well as for the exemption of his person and future acquirements? The answer is that the statute, by which alone any stipulated exemption is prohibited, looks but to property which may be the subject of present assignment. It protects the creditor's recourse to the property conveyed by avoiding all conveyances that would "delay, hinder, and defraud" him of it, without, however, protecting his recourse to anything else, because the assignment cannot operate on anything else.

Now an assignment of partnership effects is a partial one wherever the debtor has separate property. The terms of the present, embrace "all manner of machinery, stock, goods, chattels, debts, accounts, claims, and all other things whatsoever of the said William P. Jenks and company, as well real as personal, and of what nature, kind, or quality soever," which evidently has respect but to the joint effects. And this assignment of the partnership effects is on condition that the creditor execute by a day certain, "a full and sufficient [*227] *release of and from his claim, to the said William P. Jenks and William Maris, individually, and as co-partners." Such a release would unquestionably exonerate their separate estates; and the validity of the assignment

therefore depends on a single question of fact. It amply appears in the proofs reported by the commissioners, that both partners had separate property—the one to the value of several hundred dollars, and the other to the value of several thousand. The assignment was therefore fraudulent and void; and the proceeds of the property were properly awarded to the execution creditors.

Decree in each case affirmed.

Cited by Counsel, 10 W. 312; 2 Barr, 147; 7 Barr, 507; 9 Barr, 505; 2 J. 341; 1 H. 307; 5 H. 94; 9 C. 234; 12 C. 259; 13 Wr. 468; 7 S. 199; 26 S. 294.

Cited by the Court, 4 Wh. 409; 1 H. 239.

Affirmed in 6 W. & S. 312; and re-affirmed in 4 Barr, 448.

[Philadelphia, April 16, 1835.]

Robinson *against* Bulkly.

IN ERROR.

A writ of error to a judgment on an award of arbitrators, issued and delivered before the expiration of the time allowed for appeal, is improvident.

This suit was brought by the defendant in error, before an alderman, to recover twenty-six dollars and seventy-one cents, and interest, for work and labour. The alderman gave judgment for plaintiff for thirty-two dollars. The defendant appealed. The declaration contained two counts, one for work and labour, and one for goods sold and delivered, alleging the cause of action in each at fifty dollars. The plaintiff took out a rule of reference; the case was arbitrated and an award for plaintiff for thirty-two dollars and seventy-six cents, which was filed 24th May, 1833. The writ of error was received in the court below, the 11th of June, 1833, eighteen days after the award was filed.

Holcomb, for defendant, moved to quash the writ, on the ground, that it had been delivered, before the twenty days allowed by the act of 1810, to appeal from an award of arbi-

trators, had expired. The court would not assume, in any case, that a party did not intend to appeal. It was in the discretion of either party to do so, any time within twenty days, from the filing of the award. This court would not allow the record to be removed, or its jurisdiction to commence, until after that period had elapsed. He cited Ebersoll *v.* Krug, 3 Binney, 528.

[*228] *Per Curiam.—According to the principle of Frantz *v.* Kaser, 3 Serg. & Rawle, 395, and Ebersoll *v.* Krug, 3 Binney, 528, the writ issued improvidently. It would have been well enough, had it been delivered after the period for an appeal had elapsed; but it was delivered on the eighteenth day, and it therefore cannot be sustained.

Writ of error quashed.

Cited by Counsel, 5 S. 127.

[Philadelphia, April 16, 1835.]

Walter *against* Bechtol.

IN ERROR.

A defect in a recognizance on an appeal from an award of arbitrators, is waived by the appellee's omission to rule the appellant to amend it.

An appeal does not lie from the judgment of a justice of the peace, where the amount of the demand is not set forth on his docket.

Payment of all the taxed costs is essential to perfect an appeal; and it is error to refuse to strike off an appeal when all the taxed costs have not been paid.

Error to the Common Pleas of *Northampton* county.

The defendant in error, who was the plaintiff below, brought this suit originally against Bechtol, before a justice of the peace, and stated it to be for "debt or demand, not exceeding one hundred dollars. To a slay sold by plaintiff to defendant, about the middle of December, 1828." Judgment being rendered for the defendant, the plaintiff appealed, and declared for money had and received. The plaintiff on the 9th October,

[Walter *v.* Bechtol.]

1830, entered a rule of reference, under which arbitrators were chosen, who awarded on the 15th November, 1830, in favour of the defendant. On the 4th December, 1830, the usual affidavit for an appeal was made by the attorney of the plaintiff. The bill of costs as taxed amounted to twenty-seven dollars and eighty cents, in which, however, the prothonotary omitted to include the costs before the justice. The plaintiff's attorney paid the prothonotary twenty dollars on account, directed an appeal to be entered, and a recognizance was taken, the condition of which was, that, if the plaintiff should not recover in the event of the suit, a sum greater or a judgment more favourable than the report or award of arbitrators, he should pay all costs that should accrue, in consequence of the said appeal, and one dollar per day for each and every day that should be lost by the defendant in attending on such appeal, or in default thereof, would surrender the said John *Bechtol to the jail of said county in discharge of the said recognizance. [*229]

On the 14th of January, 1831, the balance of the taxed costs was paid to the prothonotary, but the costs before the justice remained unpaid.

On an affidavit of the facts relating to the non-payment of the whole costs, a motion was made by the defendant, to dismiss the appeal, which was refused by the court, who filed their opinion in writing.

The cause was tried at the same term, and a verdict rendered for the plaintiff, for ten dollars; whereupon the defendant took this writ of error, and assigned for error:—

1. That the Court of Common Pleas had no jurisdiction, as no appeal lay from the justice.

2. That the appeal from the award of arbitrators, was not properly entered, and should have been dismissed—

1. Because the recognizance is not according to law.

2. Because the costs were not paid off.

It was argued by *Porter*, for the plaintiff in error, who contended that no appeal lay from the judgment of the justice. The docket of the justice shows the cause of action to be for a

debt or demand, not exceeding one hundred dollars, but does not set out the amount. It falls, therefore, directly within Stoy *v.* Yost, 12 Serg. & Rawle, 385. As no appeal lay, the Common Pleas had no jurisdiction, and want of jurisdiction is not cured by acquiescence, as is shown in the case just cited. Moreover, the recognizance on the appeal from the award of arbitrators is defective. It is not in conformity with the act of 20th of March, 1810. It superadds a condition for surrender of the plaintiff to jail, in discharge of the recognizance; and upon this point he referred to 4 Serg. & Rawle, 260; 14 Serg. & Rawle, 112; 13 Serg. & Rawle, 243.

The court below were in error, in refusing to strike off the appeal from the award of arbitrators. All the taxed costs had not been paid, and their payment is essential to the appeal. Fraley *v.* Nelson, 5 Serg. & Rawle, 234; Ib. 390; 11 Serg. & Rawle, 359.

Scott, contra, argued that the refusal of the court to strike off an appeal from an award of arbitrators, was not ground for reversal on a writ of error. The propriety of refusing such a motion depends upon a variety of facts governing the discretion of the court, which cannot appear upon the record. He took a distinction between striking off an appeal and a refusal to do so. The former is an award in the nature of a judgment which disposes of the suit, the latter is a mere refusal to act, which leaves things in *statu quo.* In all the cases on this subject, the appeal has been stricken off by the court below. There is no case where this court has ordered that to be done, by reversing the judgment of an inferior court, which had [*230] *refused it. It was decided by the High Court of Errors and Appeals, that a writ of error did not lie to a decision of the Supreme Court, on a motion unconnected with the trial of the cause. 2 Binn. 91. Where the discretion of the court below is to be exercised on facts, it is to be presumed they exercised a sound discretion; and even if they put the facts on record, this court will not see them. Nicholas *v.* Wolfersberger, 5 Serg. & Rawle, 167; 16 Serg. & Rawle, 318; Ib. 320.

There are cases where an appeal will be supported, though the costs are not paid. If all the costs which are taxed at the time of the appeal, are paid, the appeal is good, though other costs are taxed within the twenty days of which he had notice. Stewart *v.* Jewell, 11 Serg. & Rawle, 359. *Non constat* that the defendant's bill had been taxed. The costs paid covered everything else. If any presumption be admitted, it will be to support a judgment. 14 Serg. & Rawle, 220. The facts on which a judgment is reversed must be clear and appear with certainty to the court. Ib. Here they do not appear, and according to Nicholas *v.* Wolfersberger, cannot be known to the court.

If there be any defect in the recognizance, it is waived by not taking the objection in the court below, and on the point of waiver, he cited Mayes *v.* Jacoby, 8 Serg. & Rawle, 526; Cameron *v.* Montgomery, 13 Serg. & Rawle, 128; Heckert's Case, 13 Serg. & Rawle, 104.

He contended, in conclusion, that the court below had jurisdiction of the appeal from the justice, and referred to 12 Serg. & Rawle, 385; Ib. 388; Stewart *v.* Keemle, 4 Serg. & Rawle, 72; M'Kim *v.* Byrson, 2 Serg. & Rawle, 463.

Per Curiam.—The objection to the recognizance is obviated by the fact, that it was in the power of the appellee, to have it amended, and by omitting to rule the appellant to do so, he waived the benefit of bail altogether. The other objections are better founded. The amount of the demand is not so stated as to entitle the party to an appeal; and the costs were not paid within the period allowed to perfect the appeal, of which payment of all the taxed costs is an integral part.

Judgment reversed, and the appeal quashed.

Cited by Counsel, 7 W. 122, 510; 9 W. 17.

[*231] *[PHILADELPHIA, APRIL 16, 1835.]

Waddell *against* Rattew.

IN ERROR.

Testator devised to his son A. a messuage to hold to him, during the term of his natural life; and if he should thereafter have issue of his body lawfully begotten, then to hold to him, to his heirs and assigns forever; but in case he should die without leaving such issue, then to all the rest of testator's children, their heirs and assigns forever, as tenants in common. A. suffered a common recovery and had issue, who died during his life.

Held, that the ulterior limitation was a contingent remainder and not an executory devise, and was barred by the recovery.

ERROR to the Common Pleas of *Montgomery* county.

John Rattew, being seized in fee of the premises in question, by his will dated October 26, 1780, devised the same in the following words: "I give, devise, and bequeath, unto my son Aaron, the messuage, plantation, and tract of land, where my son John now lives, in Middleton township, containing about one hundred and nineteen acres, more or less, with the appurtenances; to hold to him my said son Aaron, during the term of his natural life, and if he shall hereafter have issue of his body lawfully begotten, then to hold to him, his heirs, and assigns forever; but in case he shall die without leaving such issue, then I give and devise the same to all the rest of my children, their heirs and assigns forever, as tenants in common."

He also devised other estates to his other children, and to his son John all the residue of his estate in fee.

The testator died in May, 1781, leaving children. Mary intermarried with David Waddell, now deceased. William and Aaron both deceased without issue; and John, who died, leaving issue John Rattew, and Eleanor intermarried with William L. Fox, the defendants, to whom he devised the premises.

Mary Waddell, the plaintiff, claimed as one of the children and heirs of John Waddell, one of the children of Mary Waddell, the testator's daughter.

[Waddell *v.* Rattew.]

Aaron Rattew, to October Term, 1793, suffered a common recovery in the Common Pleas of Delaware county, wherein Joseph Hemphill was demandant, and Aaron Rattew tenant to the *præcipe*.

Aaron Rattew subsequently sold several parcels of the premises to various persons.

The judgment in the court below was for the defendant; whereupon this writ of error was brought.

Dick for plaintiff in error, with whom was *Dillingham*.—Aaron *took a life estate under the will, capable of being enlarged into a fee simple on the birth of issue; [*232] but defeasible afterwards on his dying without leaving issue. The ulterior devise to the other children was therefore an executory devise, and not a contingent remainder; and not barred by the recovery. He cited Pells *v.* Brown, Cro. Jac. 590; Fearne, 396, 397, 476, 478, 479; 1 Preston on Est. 86, 89; 1 Wilson, 106; Gulliver *v.* Wickett, 1 Bro. Ch. 187; Wilmot, 308; Hayes on Lim. 28; 3 Serg. & Rawle, 470; 1 Johns. 451.

Edwards and *Tilghman*, for the defendant in error.—The devise to Aaron was for life, with a contingent remainder in fee to his children. If a devise can be construed a remainder, it shall never be taken as an executory devise. Fearne, 420; 14 Serg. & Rawle, 40; 1 Roberts on Wills, 478; 3 Rawle, 471. They further cited, Preston on Est. 93; Fearne, 9; Geager *v.* White, Willes, 355; Finley *v.* Riddle, 3 Binn. 139; Dougl. 753; 2 Cruise Dig. 313; 8 Mass. Rep. 37; 1 Prest. on Est. 488.

Dillingham in reply, referred to 3 T. R. 143; 1 Prest. 40; Hayes on Lim. 81; Prest. 490; 1 P. Wms. 535.

The opinion of the court was delivered by

Kennedy, J.—As the question to be decided in this case arises out of the will of John Rattew deceased, it becomes necessary in order to solve it correctly, to ascertain, if possible,

from the face of the will itself, what was the intention of the testator. And after having discovered this, it will be our duty in construing the devise in question, to carry it into effect, so far as it shall be found consistent with the rules and policy of the law to do so.

The words of the will which have given rise to the present controversy are: "Item, I give and bequeath to my son Aaron, the messuage, plantation, and tract of land, (where my son John now lives,) in Middleton township, containing about one hundred and nineteen acres more or less, with the appurtenances, to hold to him, my said son, Aaron, during the term of his natural life, and if he shall hereafter have issue of his body lawfully begotten, then to hold to him, and his heirs and assigns forever; but in case he shall die without having such issue, then I give and devise the same to all the rest of my children, their heirs and assigns forever, as tenants in common."

The plaintiff's counsel contend that Aaron took under the will a conditional fee, determinable upon his dying without issue living at his death, and that the limitation over in that event to the testator's other children, must therefore be considered an executory devise, and consequently not affected by the common recovery suffered by Aaron; or, in other words, they allege that Aaron, according to the terms of the will, in case he had had issue, would thereupon have become immediately vested with a fee-simple estate in the land devised to him,

[*233] defeasible, however, upon his dying without *issue living at the time of his death: The birth of issue would have instantly determined his life estate, by enlarging it into a fee; and again in the event of his surviving such issue, and dying without any living at the time of his death, the ulterior devise to the other children of the testator, could only have operated as an executory devise; because as a contingent remainder, it could not take effect after the determinable fee had become vested in Aaron. I must confess that this view of the devise in question when first presented by the counsel for the plaintiff, struck me forcibly as having something in it: and it was certainly maintained on their part with great ingenuity. And if Aaron had not suffered the common recovery and had

had issue, who had died during his life, and he had then died himself without any living at the time of his death, it may possibly be that the ulterior devise of the land to the other children of the testator, would have operated and taken effect as an executory devise, for it has been said, that an estate may be devised over in either of two events, so that in the one event the devise may operate as a contingent remainder, and in the other as an executory devise. Doe *v.* Selby, 2 Barn. & Cress. 926; s. c. 9 Eng. Com. Law. Rep. 277; 2 Pow. on Dev. (by Jarman,) 245. Be this however as it may, the event which has occurred in this case does not render it necessary to decide it under such aspect; but if it did, I see no objection that could be made to it, unless it might possibly be thought by some, that to adopt such a principle, would be entrenching upon a rule that has been said to prevail without even an exception to it; which is, that when a devise is capable according to the state of the objects at the death of the testator, of taking effect as a remainder, it shall not be construed to be an executory devise. Reeve *v.* Long, Carth. 310; Purefoy *v.* Rogers, 2 Saund. 380, and case cited in note (9), also 2 Pow. on Dev. by Jarman, 237. Besides this there is said to be another rule by which an executory devise is distinguishable from a contingent remainder, which seems to be opposed to the construction contended for by the plaintiff's counsel: it is this; that to constitute an ulterior limitation, an executory devise where there is a prior estate of freehold devised, the latter must not be merely liable to be determined before the former shall take effect, which only renders the remainder dependent on it contingent, but it must be determined before the taking effect of the ulterior devise; as in the case of a devise to A. for life, and after his decease to the unborn children of B., this would be a contingent remainder in such children; but under a devise to A. for life, and after his decease and one day to the children of B., the children of B., in this case would take an executory devise. 2 Pow. on Dev. by Jarman, 238. And for the day undisposed of, between the death of A. and the time fixed for the ulterior devise to the children of B. to take effect, the estate would belong to the heir or residuary devisee. Ib.

Stephens *v.* Stephens, Ca. Temp. Talb. 238. Now it is [*234] obvious *in the case under consideration, that the prior estate devised to Aaron for life, could not be said to be necessarily determinable before the time at which the ulterior limitation over to the other children of the testator was to take effect; it was at most, even upon the construction contended for by the counsel of the plaintiff, only liable to be determined before that event might happen; and hence according to the rule just mentioned cannot, or at least in the event that has occurred, cannot be considered an executory devise, but must be deemed a contingent remainder. This construction seems to be requisite also, for the purpose of carrying into effect an intention pretty plainly manifested by the testator, that Aaron should not have it in his power to dispose of the land beyond the period of his own life; so that by construing the prior devise to Aaron, for the term of his natural life, an absolute vested estate in him for life, making it neither more or less, with a contingent remainder to him in fee upon his dying, leaving issue living at the time of his death; we give full effect to the letter of the will, as well as the intent of the testator.

If the fee given to Aaron, which is admitted to have been determinable, had vested in him during his life, the limitation over to the other children of the testator could only have taken effect as an executory devise, but being over in contingency, and the event having failed upon which it is claimed by the counsel for the plaintiff, that it would have become vested, the ulterior devise of the land to the other children had all the properties of a contingent remainder, and as such might and would have taken effect, if the recovery had not been suffered, and therefore could not have operated as an executory devise. The devise to the other children of the testator, is not then the case of a limitation over to them, after a prior vested determinable fee given to Aaron, which would make it an executory devise, but it is one of two several fees limited merely as substitutes or alternatives, one for the other, that is, the first to Aaron, if he should die leaving issue living at the time of his death; but if not, then to the other children

of the testator in lieu thereof; thus substituting the latter in the room of the former, if it should fail of effect. This is the principle which was decided in Loddington *v.* Kyme, 3 Lev. 431; s. c. 1 Ld. Raym. 208, where it was held that the first remainder was a contingent remainder in fee to the issue of A., and the remainder to B. was also a contingent fee, not contrary to, or in any degree derogatory from the effect of the former, but by way of substitution for it. And this sort of alternative limitation was termed a contingency with a double aspect. Fearne on Cont. Rem. 373. So that if the estate vested in the one, it never could in the other. Herbert *v.* Selby, 2 Barn. & Cress. 926; s. c. 9 Eng. Com. L. Rep. 278. The ulterior devise then to the other children of the testator, being considered in the event that has taken place, a contingent remainder, and Aaron by suffering the common recovery, having *determined his life estate, the only prop of the remainder, before it became vested, it fell, and never could take effect afterwards. [*235]

The plaintiffs therefore have no right to recover the land, and the judgment is affirmed.

Cited by Counsel, 3 Wh. 210; 7 W. & S. 292; 2 Barr, 279, 336; 4 H. 102; 6 H. 76; 12 H. 170; 4 C. 98; 1 G. 62; 11 S. 113.

[Philadelphia, April 16, 1835.]

Clark *against* Morton.

IN ERROR.

The making of a will in writing, and its contents cannot be established by evidence of the verbal declarations of the deceased, going to show that he had made a will in writing, and how he had disposed of his estate by it, in the absence of the *corpus* of the will, and of all evidence that it had been seen by the witness.

This was a writ of error to the Common Pleas of *Philadelphia* county.

It was a feigned issue to try the validity of an alleged will

of the late Judge Morton, brought against Clark and wife, his wife claiming to be heir at law of Judge Morton.

A witness having testified that Judge Morton had told him he had written his will himself; the plaintiff proposed to ask the contents of the will as stated to the witness.

This was objected to by the defendant: but the court admitted the testimony; whereupon the defendant tendered a bill of exceptions.

The court charged the jury, that "by the law of Pennsylvania, the execution of a last will must be proved by two witnesses. But after its legal execution is so proved, its contents in a case when it is necessary to show them otherwise than by the adduction of the instrument itself, may be established by one witness. Thus where a will is shown to have been lost by accident, or suppressed and spoliated by fraud; then after the existence and execution of the paper as a will, are proved by two witnesses, one witness, conversant with its contents, would be adequate to prove them.

"In the case before us the plaintiffs who set up the alleged written will, have neither produced the instrument itself, nor two or more witnesses who have seen the *corpus* of the will, and can thus establish its existence and execution; which latter it is insisted they must do, even if the non-production of the will is proved to be the result of the fraudulent spoliation and destruction of it. It is as distinctly denied by the defendants, [*236] that the existence, execution, and contents *of a will in writing can be proved by the declarations of the testator made before his death, even where such declarations are offered for these purposes, against a party, charged directly with fraudulently spoliating and destroying the written will. This is an alarming doctrine, if correct, and could not fail to produce dangerous results; leaving to the instrument most likely to be spoliated the least amount of protection.

"The doctrine considered by the court as soundest in the case before you, may be thus stated. If you are satisfied from the testimony of two witnesses, proving the repeated declarations of Judge Morton to that effect, that he had made and executed his will and testament in writing; and if you are sat-

isfied from the evidence in the cause, that the will so executed continued in existence until after his death, when it was fraudulently spoliated and destroyed by the defendants; and if you are satisfied from the evidence, that the contents of the will so legally executed and fraudulently destroyed by the defendants, are such as have been represented by the plaintiffs, then your verdict should be in their favour—otherwise the verdict must be for the defendants. Fraudulent spoliation of a will is never presumed by the law. When a will shown to have been executed is not found at the death of the supposed testator, the presumption of law always is that it has been destroyed by the testator himself. Spoliation is to be proved by the party averring it; but, like any other fraud, it may be shown by circumstantial evidence.

"It is not the intention of the court to withdraw any of the facts of this cause from your decision; of these you are the sole and exclusive judges."

The defendant excepted to the charge of the court.

D. P. Brown and *Broom*, for the plaintiff in error.

1. The declarations of the testator, that he had made a will, and of the contents thereof were inadmissible.

The existence of a legal will must be proved, before evidence can be given of its contents. Proof of contents being secondary, it must be first shown that the will had legal existence, and its non-production accounted for. Proof of contents cannot have greater effect than the writing itself, if produced. No writing purporting to be a will, can be admitted as such until its execution is proved by two witnesses. A will produced with no other proof than the declaration of the testator, that he had made a will, and his declaration of the contents could not be admitted in evidence. There must be the testimony of witnesses identifying the paper containing the will—and showing that it was written before the testator's death: some one living must prove these facts; declarations of a deceased person are not sufficient. The testator has no right to devise, but in the manner prescribed by law—and his declarations [*237] *cannot be taken in violation of the law, or to impair

the rights which the law gives to his heirs. If the will could not be received in evidence, the contents could not; for the contents capable of proof can only be of a legally executed will The contents of a paper not a legal will, cannot be evidence to establish a will. The only proof offered here, was of the declarations of the testator, for no witness ever saw a word written on any paper purporting to be, or shown, or said to be, a will. These declarations cannot supply the want of writing, for the avowed intent of the act was to guard against the danger of them—the act of 1705 requires wills of lands to be in writing, and the writing to be proved by two witnesses. The writing is the only evidence allowed of the will of the testator, except in case of loss, when proof of its contents may be allowed. Nevertheless, the proof of the execution is never dispensed with. The contents of the writing, after it is duly proved, can only be learned by the production of the *corpus* or by a witness who saw it, and remembers the contents. The oath of a witness of what another said is inadmissible.

To constitute a valid will for the disposition of real estate, it is necessary that it should be reduced to writing, in the lifetime of the testator, and proved by two witnesses. Rossetter *v.* Simmons, 6 Serg. & Rawle, 452. "If there be two witnesses which did see and read the testament written and do remember the contents thereof, it is sufficient;" Swinburn on Wills, 450. There must be one witness superior to all exception, and circumstances going to show the identical paper proved by the witness. Reynolds *v.* Reynolds, 16 Serg. & Rawle, 82. Here was no paper containing a will identified by any witness, nor any circumstance going to show the identity of any such paper. If a will of lands be lost, or secreted, parol proof of its contents by one witness will be sufficient, the proof of the execution being made by the requisite number. Lewis *v.* Lewis, 6 Serg. & Rawle, 497. The proof of execution by the requisite number, is therefore precedent to that of the contents. The question excepted to, should not therefore have been allowed by the court below, the primary proof not being made.

2. The charge of the court is erroneous. Many of the re-

marks already made, apply in principle to the charge. The court should have instructed the jury that the facts proved, if believed by them, did not amount to legal proof of the execution of the will.

The legal execution of a will in writing, is a matter of law, entirely for the court. Lewis *v.* Lewis, 6 Serg. & Rawle, 497. It was for the court to instruct the jury that the will was not proved by two witnesses. Reynolds *v.* Reynolds, 16 Serg. & Rawle, 85. It should not have been left to the jury to draw possible inferences and conclusions from facts indubitably proved. Hock *v.* Hock, 6 Serg. & Rawle, 48. When therefore taking all the facts offered in evidence by the plaintiffs to be true, they did not amount to legal *proof of the will, [*238] there was no question for the jury. But instead of this, the court laid down the doctrine to be—

1st. That if the jury believed from the repeated declarations of the testator, that he had made and executed his will;

2d. That it was spoliated after his death by the defendants;

3d. That the contents were as represented by the plaintiffs—

They should find for the plaintiffs.

Now if the declarations of the testator could not make a will of lands, then the jury's belief in the truth of these declarations could not justify a finding for the plaintiffs. Or if the contents could be proved only by some one who saw them, the belief in the testator's declarations, will not justify a finding for the plaintiffs. And the court should have instructed the jury, that the contents could only be proved on oath, &c., by those who have read and remember them. 4 Burn. Ec. Law, 253; Swinburn on Wills, 450. The first and third positions of the court rest on the testator's declarations alone; the second, concerns the spoliation.

Spoliation assumes the fact of the existence of a will, and was improper for the consideration of the jury until existence were proved. The effect on the jury is obvious.

The heir at law is found in possession of the estate and effects of the ancestor. He has the opportunity to destroy the

will, and is supposed not to be too good for it; therefore it is presumed that he destroyed it; and then it is presumed there was a will or he would not have spoliated it; and then that the will was duly executed, or he would not have spoliated it; and thus a will is established without the proof by any witness who saw it, but by the loose declaration of a testator which the law attaches no importance to, and perjury is invited and encouraged while heirs are discountenanced and inheritance endangered.

Meredith and *Williams* who argued for the defendants in error, observed that the fact of spoliation having been entirely left to the jury upon the evidence before them, it was clearly established by their verdict and must be so taken in this court. That in regard to the nature of the evidence in such a case, the rule is as stated by Lord Hardwicke in Cookes *v.* Hillier, 1 Ves. 235, that when deeds or writings are destroyed by a party who would take the benefit thereof, a court of equity *in odium spoliatoris* will go further than a court of law. To show how far equity has gone in admitting and acting on this rule, they cited and commented on the following cases. Dalton *v.* Coatsworth, 1 Peere Wms. 731, and the cases there cited. Woodroffe *v.* Woodroffe, 1 Dick, 32; Bowles *v.* Stewart, 1 Sch. & Lef. 222. Our courts acting on equity principles will adopt the same rule and allow to go to the jury the same testimony on which a chancellor would found a decree. All the circumstances from which fraud is to be presumed are to be laid before the [*239] *jury, who are the sole judges of the weight of the presumptions and alone competent to draw the conclusions. Havard *v.* Davis, 2 Binn. 427. The decisions under the act of 1705 have gone the full extent of the decisions in England. Per Duncan, J., Resseller *v.* Simmons, 6 Serg. & Rawle, 455.

Then as to the errors assigned.

1. The declarations were evidence. This is the case of a will suppressed or spoliated by the heir, written by the testator himself, and not submitted for examination to any one. The very case therefore supposes the will either destroyed or in possession of the interested party, and is clearly one for secondary

evidence. What is publication or republication but declarations? Everything in the nature of proof is merely evidence of intention, and what better evidence of intention than the declarations of the party himself. In Walmsley *v.* Read, 1 Yeates, 90, the testator's declarations to Ridge that he had given instructions to Livesy were received, and yet witness never saw the will, nor heard its contents read, and only knew of them from the testator himself.

In Hock *v.* Hock, 6 Serg. & Rawle, 47, the testator did not mention to the witness the contents of the will. It is no authority that such evidence of declarations of the testator would not be received: but only shows that the want of them lost the cause. Revocation of a will must be with the same solemnities as the execution, yet evidence of revocation by acts explained by declarations is constantly received. Boudinot *v.* Bradford, 2 Dall. 266; Lawson *v.* Morrison, Ib. 286; Havard *v.* Davis, 2 Binn. 406; Eysler *v.* Young, 3 Yeates, 511; Rosetter *v.* Simmons, 6 Serg. & Rawle, 456; Burns *v.* Burns, 4 Ib. 298; Reynolds *v.* Reynolds, 16 Ib. 82; Trevelyan *v.* Trevelyan, 1 Eng. Eccl. Rep. 64; Davis *v.* Davis, 2 Ib. 278; Forster *v.* Forster, 2 Ib. 182, were cited as cases in which declarations were received as to existence and contents of the wills without objections.

Again, the declarations of the testator were evidence, and ought to have been received. The testator is a party, and his declarations bind those who come in under him. Nelson *v.* Oldfield, 2 Vern. 76; Lightner *v.* Wike, 4 Serg. & Rawle, 206; Spangler *v.* Rambler, 4 Serg. & Rawle, 193. So declarations in presence of testators are admissible on the question of capacity. Irish *v.* Smith, 8 Serg. & Rawle, 573, where the court held him to be a party so far as to be affected by what was said in his presence.

2. As to the charge of the court.

The will must be in writing. But the fact that it was in writing may be proved by one witness; the assent being proved by two. In Walmsley *v.* Read, none saw or knew of the writing but Livesy; and in Hock *v.* Hock, if the will drawn by Carrington had been identified by a statement of the contents

[*240] by Rodernel, it would have *been sufficient. There is nothing in the act which requires proof of the continuance in existence of the will, until the testator's death. The cases show that any evidence sufficient to satisfy a jury will authorize them to find that fact. Burns *v.* Burns, 4 Serg. & Rawle, 296.

As to proof of the contents of the will, one witness is fully sufficient. Lewis *v.* Lewis, 6 Serg. & Rawle, 489. And spoliation after the death is unquestionably a simple fact upon any evidence for the jury.

The charge then, leaving all these facts to the jury upon the evidence, was correct, and their finding is conclusive.

Have then the requisitions of the act in relation to proof of the will by two witnesses been complied with? In this case declarations were made in reference to a will which Morton had drawn himself, which was in his possession, and which, if it had not been suppressed by the heir, would undoubtedly have been established. Under the decisions, it is not necessary that a will should be sealed; that it should be proved by all the subscribing witnesses; that proof should be made by the subscribing witnesses at all; nor that any subscribing witnesses are necessary. Walmsley *v.* Read, and Rosetter *v.* Simmons, show that all that is required is, that the *animus testandi*, the intentions of the testator, should be shown by two witnesses; and that evidence whether by those witnesses or by others, of its being in writing, should be produced. The intention is ascertained by the testator's declarations after, as in Walmsley *v.* Read, or by his instructions before the writing of the will, as in Rosetter *v.* Simmons. If a witness testifying to declarations connected with, or referring to a written will, though the witness never saw it, is a credible witness within the statute, then another proving the same facts must be a credible witness also; and two such are abundantly sufficient. Spoliation which is here found supposes as against the spoliator, that the will is in existence at and after the death. And this is an answer to the argument that we have not the *corpus*, the existence of the will. It is shown by the fact of spoliation.

[Clark *v.* Morton.]

The opinion of the court was delivered by

KENNEDY, J.—The main question to be resolved in this case is, whether the making of a will in writing and its contents can be established by parol evidence of the verbal declarations of the deceased, going to show that he had made a will in writing, and how he had disposed of his estate by it.

By our act of assembly of 1705, a will made in order to convey lands, must be in writing and proved by two or more credible witnesses. Now it is perfectly obvious that the proof required to be made of a will for such purposes, necessarily involves the proof of its actual existence. But can this, according to the true meaning of *the act of assembly, be done by giving parol evidence of the verbal declarations of [*241] the party alleged to be the testator, without producing the will itself; or proof being made that it had been seen, or that the party claiming in opposition to it, had admitted its existence? The design of the act in requiring the will to be in writing, and proved by two or more witnesses, was, as I conceive, first, to prevent hasty, inconsiderate declarations of the deceased from being set up for his last will: second, to secure certainty, and to provide against mistake or misapprehension of his intention; and, third, to protect all concerned against the establishment of wills by means of fraud and perjury; which would be effected with much greater facility, if writing and the production of it, were to be dispensed with. The circumstance of the will being written, and produced to speak for itself, furnishes strong evidence of deliberation on the part of the testator, and of a settled purpose to make the disposition of his estate therein contained, while it affords at the same time the best security that can be had, either against mistake, fraud, or perjury; which otherwise might frequently prevent those taking to whom the law, by its operation when left to itself, would have given the estate.

If, however, the verbal declarations made by a person before his death, stating that he had made his will in writing, and that he had thereby disposed of his estate in the manner then mentioned by him, are, after his death, upon proof being made by two credible witnesses of their having been uttered by him,

to be taken for his will, without any proof of such writing having ever been seen, the great objects of the act of assembly will be defeated, and the actual writing of wills for the purpose of passing lands, as required by it, dispensed with. Because it is easy to perceive that a will disposing of the land of the deceased may be established by this means without a word, or even a syllable having been written for the purpose. It would be sufficient after his death to prove by two witnesses that they had heard him say before his death that he had made his will in writing and disposed of all his estate in a particular way, then mentioning how it was. In such case, if no written will in fact was ever made, it would of course be impossible to produce it; and then according to the doctrine contended for by the counsel for the defendants in error, the declarations of the deceased ought to be received as the best evidence that could be had of the making of it, seeing none could be found. Now although we might, without knowing that the person making such declarations had, as many often have had, certain reasons for concealing, or perhaps for misleading those around them, in regard to the disposition that he wished to have made of his estate after his death, be inclined to think that his declarations in this behalf afforded some presumption of his having made a will in writing; yet as soon as it is ascertained that no such will can be found, this presumption, I think, entirely vanishes. Hence it appears to me, that in the [*242] absence of the *corpus* of such will, and of all *evidence that it had ever been seen by a witness, the declarations of the deceased ought not to be admitted in evidence for the purpose of establishing it.

But the counsel for the defendants in error, in order to avoid this conclusion, seem, in the first place, to consider the declarations of the deceased measurably in the light of admissions made by a party against his interest, which are always presumed to be true upon the ground that no man will say anything in prejudice of his rights, unless it really be so; and, therefore, whatever he may say to that effect will be considered admissible evidence not only against himself, but likewise against all those claiming under him. In this, however, I

think there is a misapprehension, for whatever a man may say about his having or not having made his will, and the disposition that he wishes to be made of his estate after his death, it cannot in the least affect his right to it. He knows that if he has made his will it is ambulatory, and can have no efficacy in his lifetime; and that he has full power to revoke, alter, or destroy it at any moment he pleases; and that if no will shall be found after his death, the presumption of law will be that, in the absence of evidence to the contrary, he destroyed it, after resolving to die intestate and to leave his estate to be disposed of by the operation of the law. Seeing then that the presumption of law will be that he has died intestate unless a will be produced after his death, he may be indifferent as to what he says in respect to it. He also knows, that although he may say that he has made no will, and that he is resolved to make none, yet if he has made one, or has not, that he has it in his power still to do so, and that upon its being produced and proved by two credible witnesses after his death, to have been duly executed by him in his lifetime, that his estate will pass and be disposed of according to it, notwithstanding all that he has said to the contrary. And hence Lord Erskine says, in Pemberton *v.* Pemberton, 13 Ves. 313, "loose declarations of a testator under circumstances imposing upon him no obligation of veracity, are nothing." Besides men are often unwilling for various reasons to have it known during their lives, how they wish and intend to have their estates disposed of after their deaths, and therefore with a view of concealing their real design in regard to it, declare sometimes differently from what they intend it shall be; so if a person has made a will, though he may say he has made none, he relies on the will being produced after his death to speak for itself; and after being proved by two credible witnesses, to testify what his real design was, and the disposition he wished to have made of his estate; or if on the other hand, he has made no will, when he declares otherwise, he knows that none can be produced after his death, and that without it, the law will presume that he made none and therefore dispose of his estate as he intended it should be. Since then the declarations of a person in regard

to his having made his will and disposed of his estate in a [*243] *particular way, or of his determination not to make a will can have no effect whatever upon his right to it, the reason which renders the admissions of a party admissible evidence against him and those claiming under him does not apply to this case; and as the deceased here was under no obligation to speak the truth when he made such loose declarations on the subject, I can perceive no principle of law that will make them evidence to supply the proof required by our act of assembly in order to establish the making of his will. If the declarations of the deceased were to be received as evidence for such purpose, it would necessarily follow for the same reason, that a written will produced after the death of one, who had made it, and proved in due form might be revoked and set aside by proving that the testator had declared that he had revoked it in due form by a writing signed by him for that purpose, although no such writing could be produced, or evidence given, showing that it had ever been seen by any witness, which would, as it appears to me, be directly repugnant to the whole meaning, letter, and spirit of the act of assembly, and would in short be making the mere verbal declarations of the deceased supply what the act has expressly declared must not only be in writing, but that the writing itself must be proved at least by two witnesses.

It has also been contended, and the court below seems to have advised the jury accordingly, that the declarations of the deceased made before his death, were at least evidence against a party charged with the destruction of the will, and says, "it would be alarming doctrine if the contrary were correct, and could not fail to produce dangerous results, leaving to the instrument most likely to be spoliated, the least amount of protection." Now it is impossible to avoid perceiving, if such a charge made by the person pretending to set up a will in his favour against the heir at law, be held a good ground for admitting the declarations of the deceased in evidence to prove that a will in writing was made by him in his lifetime, as well as the manner in which he disposed of his estate, that it will be putting it in the power of the party who claims the

benefit of such declarations to make them evidence at his pleasure against the person entitled to the estate by descent, by alleging merely, without a scintilla of evidence to support it, that the latter has destroyed the will, and therefore it can not be produced. This would in effect be fixing without even the shadow of proof to sustain it, a charge of a very serious nature upon the heir at law, and one that might and certainly ought, if true, to blast his reputation in the estimation of his fellow-citizens. What then could be more alarming than this, or more repugnant to the well known and established rule of law, that every man shall be presumed innocent until the contrary be proved.

It appears to me that the court below erred greatly in this particular; and the consequence of it would be, if not corrected, not only to deprive Clark and his wife of a valuable estate, to which *their right, without a will having been made by Judge Morton, disposing of it otherwise, [*244] is admitted to be indisputably good, but to fix a stain upon their characters by fastening upon them the charge of secretly and fraudulently destroying his will. And this, it seems to me, would be done too without the slightest colour of evidence to support it: for no will was ever seen in their possession, nor were they ever heard to admit that they had seen such thing themselves, much less to say that they had destroyed it, so that a verdict of the jury and judgment of the court, equivalent in effect to a conviction, were given against them upon mere suspicion and allegations, not even supported by oath. Had the proceeding been in a criminal form; for instance by indictment, for secretly and fraudulently destroying the will of Judge Morton, I apprehend it would be difficult for any one acquainted with the rules of evidence and what would be requisite to sustain such an indictment in point of fact, supposing such a thing were by law indictable, to persuade himself for a moment that any evidence was given in this case, that could tend in the slightest degree to support the charge. Besides the declarations of the deceased, which I have shown are to be regarded as nothing, the only circumstances testified to by any witnesses which could excite even the least suspi-

cion in the most jealous mind against the plaintiffs in error, were, that Clark and his wife, according to the testimony of Mrs. Everly, the mother of the defendants in error, went into the room about eight o'clock in the morning of the next day after the death of Judge Morton, where two of the defendants in error, sons of the witness, had lodged the preceding night, and where the papers of the deceased were, and under pretence of Clark's being sick, as she said, though other witnesses said they thought him really so, locked or fastened themselves up for several hours. That they denied having seen a will of the deceased; but Mrs. Clark said, if she had found or seen one, and it had cut her off, she would have felt herself justified in destroying it. And that, according to the testimony of Chauncey Buck, at a time when some unpleasant difference existed between Clark and his wife, and after witness had talked frequently to Clark, to let his wife, as he said, have more liberty, he (witness) remarked that he kept a guard over his wife. Clark was agitated, and said "she was an important witness," without saying as to what or anything more. Now without any proof, as I shall show presently, that a will was ever seen by any witness, these were the only circumstances given in evidence, from which it is pretended that there was any ground for saying that the plaintiffs in error destroyed a will of the deceased. Possibly to the jealous, these trifles, which I think may be truly considered light as air, might appear to be proof of the fact, but it seems to me next to impossible that any disinterested and dispassionate mind could consider them sufficient to justify even a suspicion of its truth.

It has in the last place been argued, that admitting the declarations *of the deceased cannot be given in evidence [*245] to prove the making of his will and its contents, without proof being made that the body of the will itself was seen and known to exist by some one called as a witness, yet such proof was given in this case, by Ann Drew, a witness produced on behalf of the defendants in error, who testified that a considerable time before Judge Morton's death, "she held the light to him, when he picked up some papers and

said, 'I would rather the mice had destroyed my money than the papers.' I then said the papers must be of value: he replied, 'not much, but what they might be replaced: it is my will and papers.' That they were in a roll with a piece of thread tied around them; she does not recollect the size of it, but the outside was white, and saw no writing on them." Now according to the testimony of this witness, she merely saw a roll of papers in the hand of Judge Morton, without a word of writing on them that she could discover. Giving then full credit to every word of her testimony, she saw nothing that had even the appearance of his will. At most she only proves that he had in his hand some white paper, upon which she saw no writing whatever. Her evidence would have been of quite as much force and effect to prove the existence of a will in writing, as it is, if she had testified merely that "he had told her, pointing to his desk in view at the time, that his will was tied up in a roll of papers in that desk," without his saying anything more, or her seeing any paper at all; and therefore proves nothing beyond the declarations of the deceased, and is of the same character as the other testimony in this respect.

Several cases have been cited and referred to by the counsel for the defendants in error, to sustain, as well the decision of the court below in admitting the evidence of the declarations made by the deceased, for the purpose of showing that he had made a will in writing, and that it existed at the time of his death, as for supporting their charge afterwards to the jury on the effect of such evidence, if they should believe it. In none of these cases, however, was the question raised which is presented here; and certainly not decided directly by the court. The writing purporting to be a will was either produced on the trial in each case, or shown by the positive and direct testimony of some one or more witnesses who had seen it, to be in existence at or shortly before the death of the testator; and where the latter was the case, sufficient cause was also shown for the non-production of the writing alleged to be a will. But as far as anything is to be found in any of those cases bearing upon the question in this case, it is rather against

than in favour of the defendants in error. Judge Brackenridge has indicated his opinion very clearly against them in Havard *v.* Davis, 2 Binn. 425, when speaking of the evidence offered in that case, which were declarations of the testator, he says, "such evidence would seem to me to have been admissible; for it is not admitting parol evidence of a will, either as to the making of it, or as to the contents of it, but [*246] *of a fraud alleged in the production of a writing as a will, which is not." Thus showing, most distinctly, that if such declarations had been offered as in this case, for the purpose of proving that a will was made by the testator and the contents of it, they would not in his opinion have been admissible evidence. And in Reynolds *v.* Reynolds, 16 Serg. & Rawle, 82, where a writing purporting to be a will was produced and proved by the brother of the deceased to have been written by him at the request and according to the direction of the deceased, somewhat more than three months before his death, who afterwards as late as the day of his death, called him, as he testified, to witness that it was his will; and that the writing there produced was the only will that he had ever written for the deceased, this court held, that proof of declarations made by the deceased, after the brother drew the writing for him and before his death, to other persons, telling them that he had gotten his brother, naming him, to write his will, did not amount to proof of the writing as a will, by a second witness according to the requisition of the act of assembly. Now it must be admitted, I think, that there is much less reason for holding that the proof made in the present case came up to what is required by the act, than the proof offered in Reynolds *v.* Reynolds.

The judgment is reversed, and a *venire de novo* awarded.

Cited by Counsel, 2 Wh. 108; 10 Barr, 99; 11 C. 159; 14 Wr. 304; 6 N. 73, s. c. 5 W. N. C. 415.

Cited by the Court, 3 Wh. 192; 8 W. & S. 300; 26 S. 254.

[PHILADELPHIA, APRIL 16, 1835.]

Burt *against* Kurtz.

APPEAL.

A claim to perpetuate the lien of a mechanic or material man, if within time in other respects, may be filed after a judicial sale of the premises.

THIS case came before the court on an appeal from the decree of the Court of Common Pleas, of *Northampton* county, distributing the proceeds of the sale of the defendant's real estate, made by the sheriff.

It appeared that the real estate of the defendant, had been sold by the sheriff of Northampton county, on the 12th of January, 1833, to William Eichman, for one thousand two hundred and sixty dollars; and the money having been brought into court, and a dispute having arisen about the distribution of it, the court appointed a commissioner to ascertain and report the facts and liens upon the fund; who reported the following to be the state of the facts: That on the 6th *of December, 1830, James M. Porter and wife, conveyed to Henry G. Kurtz, the property consisting of two lots, marked in the general plan of the out lots in Easton, No. 2 and 3, and containing ten acres strict measure, subject to the payment of fourteen dollars and seventy-one cents, on the 20th November, yearly, and every year, during the life of Margaret Wagner, widow of George F. Wagner deceased, and the principal sum of two hundred and forty-five dollars and sixteen cents, at, and immediately after her decease, to the administrators of the said G. F. Wagner deceased. [*247]

On the 3d of March, 1831, Henry G. Kurtz commenced the erection of certain edifices on the premises, consisting of a frame dwelling-house, frame rope-house, a stable, and covering over the rope-walk, &c., all of which were completed, on or about the 1st day of June, 1831.

The property was sold by the sheriff as above stated on the 12th of January, 1833, subject to the payment of the above-

mentioned two hundred and forty-five dollars and sixteen cents, and also, to the sum of four hundred and seventy-two dollars and fifty-seven cents, with interest from the 20th of November, 1832, which said sum was secured by a mortgage on the premises given by Henry G. Kurtz to J. M. Porter. The amount of interest due on that mortgage, up to the 20th November, 1832, was to be paid out of the purchase-money; and it was stated in the conditions that the purchase-money should be applied to the payment of liens by judgments and mechanics' claims, according to their legal priority.

The liens by judgment were as follows:

November,	1830.	No.	90.	Jacob Yeager, debt, interest, and costs,	$108 00
"	"				
"	"	"	106.	William Eichman, .	408 30
August,	1832.	"	98.	John Burt, debt and interest, ...	254 96
"	"	"	99.	Jacob Sheip, balance of debt and interest, ...	18 31

All these were paid out of the proceeds of the sale under the decree of the court.

On the 24th of September, 1832, three judgments were entered up, one at the suit of William Eichman, for one hundred and eighteen dollars; one other at the suit of Clark & Heckman, for ninety dollars; one other at the suit of Aaron Snyder, for two hundred dollars.

On the 26th of September, 1832, judgment was entered up, at the suit of Nicholas Depew, for thirty dollars and fifty-eight cents, and on the same day at the suit of William Innes & Son, for twenty-six dollars and nineteen cents.

On the 2d of October, 1832, Philip Crause filed a mechanic's [*248] *lien, for work done upon buildings erected on the premises, for six dollars.

On the 20th of October, 1832, Ralph Tindall filed a claim for materials furnished, for twenty-three dollars and one cent.

On the 16th of January, 1833, after the property had been

sold by the sheriff, J. & M. Odenwelder filed a claim for materials furnished, for twenty-nine dollars and eighty-three cents.

On the 5th of February, 1833, after the sheriff's sale, and after the acknowledgment of the deed to the purchaser, Jacob Lesher filed a claim for labour and materials, for seventy-four dollars and sixty-two cents.

On the 9th of February, 1833, Joseph Burk filed a claim for materials furnished, for twenty-one dollars and ninety cents.

And on the same day, Philip Mixsell filed a claim for materials furnished, for seventy-nine dollars and two cents.

Upon this statement of facts, the question arose in the court below, whether the persons claiming to be lien creditors, for materials and labour, should be paid in preference to the judgment creditors; and the court after argument decided, that they should all be paid in preference, out of the proceeds of sale, as well those who had filed their claims before the sale as after.

From this decree William Eichman, Clark & Heckman, and Aaron Snyder, three of the judgment creditors affected thereby, appealed and assigned the following reasons for the appeal:

1. That the court erred in decreeing that the mechanics and material men should be first paid out of the proceeds of sale, and the balance be paid to the judgment creditors, according to priority.

2. The court erred in not directing that the whole of the proceeds of sale, after deducting costs, should be paid to the judgment creditors of the defendant in order of priority.

J. M. Porter, for the appellant, cited Whart. Dig. 358, pl. 163; 1 Journ. Juris. 93; Hern *v.* Hopkins, 13 Serg. & Rawle, 269.

Hepburn, for the appellee, relied on the last case cited by the counsel for the appellant, and also referred to Williams *v.* Tearney, 8 Serg. & Rawle, 58.

[Burt *v.* Kurtz.]

PER CURIAM.—A claim to perpetuate the lien of a mechanic or a material man, if within time in other respects, may undoubtedly be well filed after a judicial sale of the premises. Where the purchase-money is substituted for the land, there is no reason why the lien should not attach itself to it, as it would to the land in the hands of the purchaser, were it liable to the charge. The liens in question, therefore, were properly allowed.

Decree affirmed.

Cited by Counsel, 4 W. & S. 262; 7 O. 541.
Cited by the Court, 2 N. 123.
See Werth *v.* Werth, 2 R. 152.

[*249] *[PHILADELPHIA, APRIL 16, 1835.]

Jones and Others *against* Orum.

CASE STATED.

The plaintiff proceeded originally by *capias* indorsed, "no bail required." It was not served according to the rule of court, the defendants not having subscribed a note in writing empowering the prothonotary to enter their appearance. The sheriff returned "*cepi corpus*, and defendants discharged on common bail."

Held, that the return was nugatory and did not authorize an appearance to be entered.

Plaintiff entered a rule of reference upwards of ten years after the writ issued, and returned without being duly served, and no step taken by him during that period to continue the action, and obtained an award against all the defendants.

Held, that the rule was irregular, and that the irregularity was not waived by a general appearance by an attorney, entered after the rule of reference but before the appointment of arbitrators; the appearance having been amended by the court below, so as to stand for one of the defendants only.

ERROR to the Common Pleas of *Chester* county.

The defendant in error, who was plaintiff below, issued a *capias* against the plaintiffs in error, who were defendants below, on the 21st of January, 1820, and caused it to be indorsed "no bail required."

The rule of the Court of Common Pleas governing the practice in such cases, is in these words:

II. "When attorneys issue writs of *capias* against defendants, from whom they do not require bail, they shall mark their process with the words 'no bail required,' which the prothonotary shall indorse on the writ; in which case the sheriff or his officer shall serve the defendant with a copy of the writ, as in case of a summons: and the defendant on such service, and in all cases where common bail is ordered by a judge, shall subscribe a note with these or the like words: 'I hereby empower the prothonotary to enter my appearance to this action;' which subscription shall be tested by the officer who executes the writ."

No such note as was required by the foregoing rule was subscribed, or tested in this case. But the sheriff returned "*cepi corpus*, and discharged on common bail."

No appearance was entered by attorney, or otherwise; and the cause slept in this state upon the docket more than ten years, without any movement being made in it.

On the 8th of March, 1830, a declaration was filed, and rule to plead in six weeks entered; and on the 4th of May, 1830, judgment signed for want of a plea.

Upon this judgment a writ of inquiry issued.

On the 14th of Sept., 1830, a rule was obtained to show cause *why the judgment and rule to plead should not be stricken off the docket, which, after argument, was made absolute, and the judgment and rule struck off. [*250]

And now, June 13, 1831, on motion of B. Tilghman, and on reading the paper signed by Spicer Jones, dated the 23d May, 1831, the said paper was ordered to be filed, and leave was given to correct the general appearance heretofore entered for the defendants, by adding upon the record that B. Tilghman, appeared for Spicer Jones only, and not for the other defendants.

June 14, 1831, on motion of Mr. Dillingham, ordered that the prothonotary amend the appearance of Mr. Tilghman, directed by him in this case, by adding to his name on the margin of the record, the date at which Mr. Tilghman directed his appearance for the defendants to be entered.

April 30, 1831, arbitrators were appointed under the above

rule by plaintiff's attorney and prothonotary, in the absence of defendants, upon due proof of service of the rule of reference; to meet May 23, 1831.

May 2, 1831, a motion was entered for a rule to show cause, why the rule of reference and procedings under it should not be struck off.

May 13, 1831, Tilghman had leave to file his warrant of attorney.

The arbitrators, nevertheless, proceeded to make an award, of which the following is a copy:

"May 23, 1831, two of the arbitrators within named, viz., Henry Fleming and David Townsend, appeared at the time and place appointed. Jesse Conard, Esq., counsel for the plaintiff, appeared, and exhibited proof of the service of the rule of reference, upon two of the defendants, viz., Samuel Brooke and Thomas Jones, who did not attend. Benjamin Tilghman, Esq., appeared as attorney and counsel of Spicer Jones, one of defendants, but disclaimed any authority to appear for, or act on behalf of the other defendants. The arbitrators present then appointed and chose John Graves, an arbitrator in the room of Thomas Williamson, the other arbitrator, who did not attend; and the said John Graves, being notified of said appointment, attended: and the arbitrators being all duly qualified, proceeded to hear the plaintiff, with his vouchers and evidence; and also the allegations of the counsel for Spicer Jones, one of said defendants, and upon due examination and consideration of the evidence adduced to us, do find that there is three thousand one hundred and ninety-three dollars and seventy-eight cents, due from the defendants to the plaintiffs."

This award was duly filed, and the proceedings being under the act of 1810, was docked as a judgment.

June 22, 1831, after argument, the motion for a rule, &c., [*251] to *strike off the rule of reference, and the proceedings under it, was denied.

Whereupon this writ of error was sued out, and the following specifications filed:

1st. The declaration was filed when there was no defendant in court.

2d. The declaration was filed when the plaintiff himself, by his own laches, was out of court.

3d. The rule of reference was entered without there being any suit actually pending, or any action regularly entered, or declaration regularly filed.

4th. The proceedings of the arbitrators are irregular upon their face.

5th. Judgment has been entered against two defendants, never in court.

6th. The court below erred in refusing to strike off the rule of reference, and proceedings under it.

The plaintiff in error assigned the general errors.

The following opinion was delivered in the court below, by Judge Darlington, on a motion to strike off the judgment and rule to plead.

The plaintiff issued a *capias* against defendants, returnable to January Term, 1820, and caused it to be indorsed with the words "no bail required," according to the eleventh then existing rule of this court, which directed in such cases, that the sheriff should serve the defendant with a copy of the writ, as in case of a summons, and the defendant on such service and in all cases, where common bail is ordered by a judge, shall subscribe a note with these, or the like words: "I hereby empower the prothonotary to enter my appearance to this action," which subscription shall be attested by the officer who serves the writ: the sheriff may then return "*cepi corpus*, and the defendant's appearance accepted," or "*cepi corpus*, and defendant discharged on common bail;" then the defendant may be as effectually in court as if he were in custody, or had perfected special bail. The prothonotary may enter his appearance; a declaration may be filed; and he may be ruled to plead, or he may rule the plaintiff to declare; but before the defendant is actually in court, or has authorized his appearance, then in suits commenced by *capias*, he cannot be called on to plead, nor can any judgment be entered for want of a plea.

In cases of summons, according to long established practice, it is true, a judgment by default may be entered, but this is a

departure from the terms of the act of assembly of 20th March, 1724, which provides that if the defendant does not appear, but makes default, the plaintiff may file a common appearance for him, and proceed to judgment by *nihil dicit*. The act authorizes the plaintiff to enter the appearance, and the [*252] practice sanctions the judgment if he omits *it. Morrison *v.* Wetherill, 8 Serg. & Rawle, 502. But in the case of this *capias*, the defendant has not authorized his appearance to be entered. No act of assembly authorizes the plaintiff to do it, nor can he do it at his pleasure; inasmuch as the defendants have given no bail to the sheriff, nor are they in custody.

The sheriff in this case, instead of causing the defendants to subscribe the note, prescribed by the rule of court, or in default thereof taking the body, simply returned "*cepi corpus* and defendants discharged on common bail."

In our opinion, this did not authorize the plaintiff or the prothonotary to enter the defendants' appearance, or to consider them in court, without their consent. And therefore, the rule to plead entered ten years thereafter, on the 9th of March, 1830, and the judgment entered thereon, on the 4th May, 1830, are irregular.

Rule to show cause made absolute.

Dillingham, for the plaintiffs in error.

The process never having been served according to the rules of court, the defendant was not amenable to it. After the return day, the suit itself was at an end. Besides, if the process had been regularly served, a delay of ten years to move in it, is such laches, as the court cannot tolerate. He cited and commented on Hertzog *v.* Ellis, 3 Binn. 209; Moulson *v.* Rees, 6 Ib. 32; Brown *v.* Scheaffer, 6 Ib. 177; Paul *v.* Purcell, 2 Browne, 20; Thomas *v.* Hopkins, Ib. 145; Clemson *v.* Beaumont, Ib. 215; Maus *v.* Sitesinger, 2 Serg. & Rawle, 421; Phillips *v.* Oliver, 5 Ib. 419; Sharpe *v.* Kilgore, 3 Ib. 387; Flanegan *v.* Negley, Ib. 498. These decisions were under the law as it stood before the act of 1820, and established that a rule of reference might be entered before the re-

turn of the writ, or bail entered, or declaration filed. But could the plaintiff arbitrate after he had discontinued? or put the case of summons and *nihil?* Here the plaintiffs virtually discontinued. He was out of court by his own laches, in not declaring for a year. This is the English rule. Sell. Prac. 221. He further cited, Vitry *v.* Dauci, 3 Rawle, 1; Brown *v.* Kelso, 2 Penn. Rep. 427.

Conrad and *Kittera*, for the defendant in error.

The mode of serving the *capias* pointed out in the rule of court, does not exclude such other as the plaintiff may direct. Here the order indorsed on the writ, is defendant's appearance accepted. The plaintiff may have given special orders, or the defendant may have signed a paper, authorizing his appearance to be entered, which has been lost.

2. Mr. Tilghman's appearance was good for all the defendants. There cannot be a special appearance, for one in suit against partners. Taylor *v.* Coryell, 12 Serg. & Rawle, 250. His declaration of his want of authority is no evidence of the fact.

*3. The legislature have not altered the law in any respect, except that a plaintiff cannot arbitrate before return day, or without a declaration. Suppose defendant arbitrates before return day, and afterwards a *nihil* is returned, it is good. If there was no appearance, still there was an action brought, and a rule of reference might be entered. They further cited, Phelps *v.* Johnson, 4 Cow. 61; Salmon *v.* Davis, 4 Binn. 375. [*253]

The plaintiffs by their motions, considered the case in court, and therefore cannot complain of lapse of time.

Chauncey in reply, argued the matter, as it stood first, on the entry of the rule of reference, and secondly, on the appearance of Mr. Tilghman. He contended that it never had been decided, that a rule of reference could be entered after process returned not served; that here was a lapse of ten years, without continuances, or even delaration. If this could be tolerated the limitation law would be virtually abolished. How did

Mr. Tilghman's appearance alter the state of things? It was amended by order of the court, and the effect of that order, was to destroy all he had done as attorney for any except S. Jones, and he appeared for him only. He cited 2 M'Cord, 311, to show that before trial, the court will never refuse leave to amend, when the attorney shows he had no authority. A partner after dissolution, cannot appear for the others without express authority. This principle seems settled by the analogous decisions of this court, on the statute of limitations. Levy *v.* Hipple, 17 Serg. & Rawle, 126.

The opinion of the court was delivered by

SERGEANT, J.—Several errors in the proceedings below have been assigned in this court, which result in the question, whether the award against all the defendants was valid. The plaintiff proceeded originally by *capias ad respondendum* indorsed "no bail required," but it was not served according to the rule of court, the defendants not having subscribed a note in writing, empowering the prothonotary to enter their appearance, and therefore the return of the sheriff of "*cepi corpus*, and the defendants discharged on common bail," was nugatory, and did not authorize an appearance to be entered. The court below so decided, when they ordered the rule to plead and judgment to be struck off, and we think rightly. The sheriff was bound either to take such a note in writing, as would justify an appearance to be entered, or to hold the defendants to special bail. Barnard *v.* Field, 1 Dall. 348; 3 Binn. 286. It is suggested that such a note may have been signed, and afterwards lost. If this were so, the fact might have been shown to the court below, on the hearing, and if satisfactorily established, would no doubt have produced a different result.

After this order of the court below, the plaintiffs entered a [*254] rule of *reference under the arbitration act, and caused notices to be served on the defendants, and it is insisted now, on the authority of Flanegan *v.* Negley, and similar cases, that a suit having been once entered on the docket, the rule of reference was regular, though upwards of ten years had elapsed after the writ was first taken out, and returned without

being duly served, and not a single step had been taken by the plaintiffs during that period, to continue the action. If this were so, it would certainly present an extraordinary state of things in the management of suits. A writ might be taken out, and never served, and the plaintiff lie by nearly double the period imposed by the statute of limitations, and then the plaintiff treat the action as pending, and date its existence from the first writ. This would introduce all the mischiefs the statute of limitations was intended to guard against, and expose a party to the necessity of contesting the validity of a claim, after more than six years had elapsed, and when his vouchers were lost and witnesses dead. Even where the replication of a writ taken out and continuances since, is allowed to avoid the plea of the statute of limitations, no case has gone to the extent of time, which had passed in this case. In Schlosser *v.* Lesher, 1 Dall. 415, the Court of Common Pleas, Shippen, president, considered a period of two years and a half from the original summons not too long, and a case is there referred to in 1 Sid. 53, where Twisden, Justice, says he had known a suit continued by *latitat* for five years before the bill filed, and Herne, secondary, said a *latitat* may be continued seven years. If even the latter time were adopted and the continuances here are a matter of form, it is still far short of the interval passed over. If therefore, the case be considered with a view to the principles applicable to the statute of limitations, and the doctrine of entering continuances, upwards of ten years is too long a period, and the action must be considered as discontinued.

But though some analogy exists to cases under the statute of limitations, there are material differences between the common law principles applicable to that statute, and those which regulate the right of arbitration, under the act of 1810, and its amendment of the 28th of March, 1820, and this case depends on the true construction of these acts, rather than on corresponding principles in other matters, existing at the common law.

The arbitration act of 20th of March, 1810, had not been long in use, before some of its features were found in prac-

tice, to present much inconvenience and incongruity. In the cases of Hertzog *v.* Ellis, 3 Binn. 209; Flanegan *v.* Negley, 3 Serg. & Rawle, 498; Sharp *v.* Kilgore, 3 Serg. & Rawle, 387; Brown *v.* Scheaffer, cited Ib., the court, under the authority in the first section, to arbitrate "at any time after the entry of the suit," felt themselves compelled to decide, that a rule of reference might be taken out before the return day of the writ, whether a *capias* or summons, even though *the writ were never served; so that there might be judgment and execution before the return day of the original process, and legal proceedings were carried on against a defendant, in a suit in which he never was served with a writ, and was not, and might never be regularly bound to appear in court. So also, the act not having required the plaintiff to file a declaration or statement, it was held that it was not necessary; in consequence of which it was often difficult to discover after the award, in what cause of action it had been made, and in Bazire *v.* Barry, 3 Serg. & Rawle, 461, this court, on a question of costs, was obliged to resort to parol evidence, to ascertain the amount of the plaintiff's claim before the arbitrators. These inconveniences induced this court, in Bazire *v.* Barry, in Flanegan *v.* Negley and other cases, about the same period, to point out in forcible language, the necessity of some legislative amendment; and on the 28th March, 1820, an act was passed, which seems to have been intended to effect the desired object. It declares that, "no rule of arbitration shall be entered or taken out, until after the first day of the term, after the suit or action may have been commenced, nor until after a declaration or statement of the cause of action shall have been filed." Now, by the first day of the term, the plaintiff may compel a return of his process, and ascertain definitely, whether it has been served or not; and if the process has not been served, and the defendant is not in court, nor is bound to be, it seems to me, the legislature intended the plaintiff should not be permitted to arbitrate; otherwise the act of 1820, goes but a little way to correct the mischiefs formerly existing, under the act of 1810, so much complained of. All the decisions relied on were prior

[*255]

to the act of 1820; none have occurred since, to sanction the former practice, nor could they, I apprehend, without marring in a great measure the principal design of the act of 1820, which was to restore the symmetry of the law, by requiring a permanent declaration in writing of the plaintiff's cause of action, before it went to a tribunal to be decided, and a service of the process, before the defendant could be considered as liable to legal proceedings in the suit, commenced by that process, and deriving its legal existence from it. At all events, I have no doubt, that if a plaintiff suffered ten years or more to elapse after a writ returned without being served, and without taking any step in the cause, the suit must be considered as discontinued; and when a suit is discontinued, the plaintiff cannot enter a rule of reference.

It is further contended by the plaintiff below, that if there were an irregularity in the proceedings, it was waived by the general appearance entered by Mr. Tilghman for all the defendants, on the 9th of April, 1831, after the rule of reference was entered, but before the appointment of arbitrators. And if this appearance had so remained uncorrected, though at the instance of one defendant only, and under circumstances of considerable suspicion, as to the motive *of that defendant, in instructing Mr. Tilghman so to act, it might perhaps have the effect contended for, without meaning, however, to express any opinion as to the power of one partner to authorize an appearance for another, either before or after dissolution, upon which some arguments and authorities have been adduced. But this appearance, though general in the first instance, was amended by the court below, and stands now on the record before us, under that amendment as a special appearance for S. Jones only, as of the date of the original appearance. This the court below, in their legal discretion, had power to do, and we must take it as it stands in the record, presuming they had good reasons for what they did. Kennedy *v.* Wachsmuth, 12 Serg. & Rawle, 171. It is, however, sufficiently evident, that if the plaintiff was, for a short period, justified in considering Mr. Tilghman as appearing for all the defendants, measures were speedily taken to apprise [*256]

him of the mistake. Two days after the appointment of arbitrators by the plaintiff's attorney and the prothonotary, a motion was made to strike off the rule of arbitration; before the arbitrators, Mr. Tilghman appeared as attorney for S. Jones only; and the plaintiff seems to have proceeded in the arbitration on the strength of his service of the rule, not on the general appearance of Mr. Tilghman, which he was then aware was withdrawn. If an attorney has erroneously appeared for a party, I know no reason why the mistake may not be corrected, provided it be done in due time, before any step taken in pursuance of it, and without occasioning loss or prejudice to the other party. See Haslett *v.* Street, 2 M'Cord, 311. I do not perceive in this case, that the plaintiff in his proceedings relied on this general appearance, or that it was not corrected in proper season. I am, therefore, of opinion, that the award was improperly made against all the defendants, and that the judgment thereon be reversed.

Judgment reversed.

Cited by Counsel, 3 H. 294.
Cited by the Court, 6 W. 529; 4 C. 262; 12 C. 474.

[*257] *[PHILADELPHIA, APRIL 16, 1835.]

Troubat *against* Hunter.

IN ERROR.

A. and B. entered into an agreement under seal, which recited that the former had purchased from the latter a house and lot in the city of Philadelphia: That the wife of C., the former owner of one-fifth of the property, had not executed the deed made by her husband and others, to B.; and that consequently, if she should survive her husband, she would be entitled to dower in the same, and that it had been agreed that a certain sum being one-third part of a fifth of the consideration-money should remain in the hands of A. until the decease of the wife of C., or until she should release her dower. A. then covenanted to pay to B. the sum so retained on the decease of the wife of C. or whenever a release of dower duly executed by her, should by the said B. be produced and delivered to him "with lawful interest on the said sum, provided the same shall not exceed eighteen months from the date" of the agreement. The wife of C. died on the 17th of October, 1826, and the

first notice which A. received of her death and the first demand made upon him for payment of the money, was the institution of an action of covenant on the agreement, on the 13th of August, 1832.

Held, that the plaintiff was entitled to recover the principal sum retained by the defendant, with interest from the death of the wife of C.

On a writ of error to the District Court, for the city and county of *Philadelphia*, it appeared that this was an action of covenant brought by William S. Hunter against John Troubat, founded upon an agreement under seal, bearing date the 4th day of December, 1810, of which the following is a copy:

"To whom these presents shall come, or may concern:—whereas, I, John Troubat, of the city of Philadelphia, merchant tailor, have purchased from William S. Hunter and Thomas Armstrong, a house and lot on the west side of Second street, between Walnut and Spruce streets, in the said city, belonging to the representatives of James Hunter, deceased. And whereas the wife of James G. Hunter, one of the said representatives, hath not executed the deed to the said William S. Hunter made by her said husband, and others, representatives of the said James Hunter, for three-fifths of the said premises, consequently if she should survive her said husband, she would be entitled to dower in the same; and whereas, it is the agreement that the sum of three hundred and sixty-one dollars and eighty-nine cents, being one-third part of a fifth of the consideration-money, should remain in my hands until the decease of the wife of the said James G. Hunter, or until she should by an instrument in writing, duly authenticated, release her right of dower in the said premises; now know ye, that I, the said John Troubat, for myself, my heirs, executors, and administrators, do hereby covenant to pay unto the said William S. Hunter, his executors, administrators, or assigns, or the person or persons legally entitled to the same, the *aforesaid sum of three hundred and sixty-one dollars and [*258] eighty-nine cents, on the decease of the wife of the said James G. Hunter, or whenever a release of dower executed by her, and duly authenticated, shall be by him the said William S. Hunter produced and delivered with lawful interest on the said

sum, provided the same shall not exceed eighteen months from the date thereof."

The following receipt was indorsed on the agreement:

"Received from Mr. John Troubat, the sum of thirty-two dollars and fifty cents, the interest due on the within covenant from said Troubat.

July 15, 1820. (Signed,)

WILLIAM S. HUNTER."

The plea was covenants performed with leave to give the special matter in evidence.

Replication non perf. and issues.

The jury found a verdict for the plaintiff and assessed damages at five hundred and two dollars and forty-two cents, "subject to the opinion of the court below, as to the claim of interest, whether the same is to be calculated from the 17th October, 1826, or from 13th August, 1832; and also whether the defendant has a right to deduct the widow's claim of dower." They further found that the article of agreement dated 4th December, 1810, as set forth above, was entered into between the parties: That the wife of James G. Hunter died the 17th of October, 1826, and that the institution of this suit, which was on the 13th of August, 1832, was "the first notice of the death of Mrs. Hunter aforesaid, and the first demand made on the defendant by the plaintiff for payment."

The court below gave judgment for the whole amount of the verdict, which included the principal sum of three hundred and sixty-one dollars and eighty-nine cents, and interest from the 17th of October, 1826, in favour of plaintiff below; and filed their opinion of record.

The plaintiff in error assigned for error:

1st. That the court below erred in their opinion, that the proviso of the agreement of the 4th of December, 1810, had respect only to the interest that accrued before the principal became due.

2d. That the court erred in saying that interest was due

under the said agreement, from the 17th of October, 1826, the day when the widow of James G. Hunter died.

3d. That the court erred in giving judgment for the whole amount of the verdict against the said Troubat.

The case was submitted to this court on written arguments by *Law*, for the plaintiff in error, and by

Stroud, for the defendant in error.

**Argument for the plaintiff in error.*—The question is, whether the plaintiff in error under the agreement [*259] of the 4th of December, 1810, is liable for more than the principal sum, three hundred and sixty-one dollars and eighty-nine cents, with interest from the commencement of the suit, 13th August, 1832, or whether he is bound to pay interest from the 17th October, 1826, when the widow Hunter died. The commencement of the suit being the first notice of her death, and the first demand of payment.

The agreement stipulates for the payment of that sum on the decease of the widow, or tender of a release of dower, "with lawful interest on the said sum, provided the same shall not exceed eighteen months, from the date of the agreement."

The English authorities show that such an agreement apart from the proviso would not carry interest. This is a single bill; not a bond with a penalty, and there is a difference between them as to interest. 2 Harrison's Digest, 1362; Hogan *v.* Page, 1 B. & P. 337; Farquahar *v.* Norris, 7 T. R. 124. An agreement under seal to pay fifteen hundred pounds, in sums at various periods does not carry interest. Foster *v.* Weston, 6 Bing. 697; 19 Com. Law R. 211. A covenant on a policy of insurance to pay a sum six months after proof of death, does not carry interest from time of proof. Higgins *v.* Sergeant, 2 B. & C. 345; 9 Com. Law R. 101. Interest is not payable on an agreement to pay a sum on recognizance money due A. Hare *v.* Richards, 7 Bing. 254; 20 Com. Law R. 123. "If plaintiff has sustained loss of interest," says Tindal, C. J., "he must ascribe it to his own

neglect, in not pursuing his remedy earlier." Havilland *v.* Bowerbank, 1 Camp. R. 50.

The same rule obtains in Massachusetts. A person covenanting to pay what should be recovered against covenantee, is liable for interest only from the time of demand made, or from the date of the writ, 2 Big. Dig. 83; Parker *v.* Thompson, 3 Pick. 429. It is true, that the allowance of interest in Pennsylvania, is carried beyond what is the rule in England, or in most of the states; the court seem to think it has gone far enough, and that it is time to pause. Graham *v.* Williams, 16 Serg. & Rawle, 258. The plaintiff in error was under this agreement, a trustee or *quasi* trustee for the widow, as to her dower. The interest of the sum retained being considered its equivalent. The case of Knight *v.* Reese, 2 Dall. 182, shows that under such circumstances, interest runs only from demand, or the commencement of suit. Gaskins *v.* Gaskins, 17 Serg. & Rawle, 390, sustains the same principle. Chila *v.* Devereux, 1 Murphy, 398, shows that a debtor is excused from interest, when a creditor conceals himself, and a debtor does not know where to apply. Is not the rule the same, where a creditor conceals the happening of the event, on which the debt is payable?

[*260] *But whatever may be the rule of law in Pennsylvania, apart from the proviso in this agreement, as to interest, the parties may make a rule for themselves. And here they stipulate for interest, for a limited time only. It ought not to be applied to interest before the principal was due. It requires an express stipulation to give interest before the time appointed for payment. Buchannan *v.* Searight, 1 Hen. & Mun. 210. Mere implication will not be sufficient. Ib. To apply the clause relating to interest, so as to make it due before the time fixed for payment, might have compelled the plaintiff in error to pay double interest, had the husband of Mrs. Hunter died the day after the agreement, and Mrs. Hunter, at the end of eighteen months, as interest under this construction, would have been due to the defendant in error, and again in the shape of dower to Mrs. Hunter. The natural presumption is that the money was not used by the plaintiff in error,

1 Camp. 50; 6 Binn. 172, per Brackenridge, J. The proviso may have been intended to stimulate the defendant in error, to give early notice of the death of widow Hunter. The cases supposed to be adverse to the present argument, do not in fact militate against it. In Obermeyer *v.* Nichols, 6 Binn. 161, it was left to the jury to give interest or not, as they thought proper. In the present case the decision of the court below, was that it must be given. Tilghman, C. J., says interest is allowed where by express agreement, a certain time is fixed; but not as matter of strict right, as in bonds with a penalty conditioned for payment of a certain sum on a certain day. 6 Binn. 162. Here the day of payment was not certain, depending as it did on a contingency, and there was no penalty. In Shaller *v.* Brand, 6 Binn. 435, there was a bond with a penalty, for which judgment was entered, and the day of payment was a certain one, which could not but be known to the obligor. So in the case of the Estate of Schæffer, 9 Serg. & Rawle, 265, there was a bond with a penalty. The death of Eliza Schæffer must have been, and was known to John; whereas, the death of Mrs. Hunter was not known to Mr. Troubat. In these cases also there is no special agreement as to interest, as there is here limiting in express terms, the period of its allowance; and they are answered by that, if our construction is right.

Argument for the defendant in error.—The finding of the jury, considered as a special verdict would be objectionable in respect to that which relates to a deduction of the widow's claim of dower; for the time of her husband's death is not found, nor any data furnished by which it can be ascertained. As however, from the agreement which is the foundation of the action, it is manifest the husband did not die seized, according to the decision in Benner *v.* Evans, 3 Penn. Rep. 454, the widow, were she living, could recover only one-third of the land laid off by metes and bounds, and not one-third of the annual value of the property; of *course, the action or right of dower would die with her; and so it is [*261] expressly decided in Mordant *v.* Thorold, 1 Salk. 262. Such

was the view taken by counsel on both sides and by the court below in the argument there, and on that account no exception is taken in this court, by reason of this imperfection in the finding of the jury. The errors assigned refer exclusively to the question, whether interest should have been given by the jury.

The first of these is in these words: "That the court below erred in their opinion that the *proviso* in the agreement of the 4th December, 1810, had respect only to the interest that accrued before the principal became due." The remaining errors specified are substantially the same, and need not be separately noticed.

Were the court below right in their construction of the agreement in regard to this proviso? The operative words of the agreement are: the said Troubat "covenants to pay to Hunter, &c., the sum of three hundred and sixty-one dollars and eighty-nine cents on the decease of the wife of the said J. G. Hunter," "with lawful interest on the said sum, provided the same shall not exceed eighteen months from the date hereof." The language might have been more explicit; there can be little difficulty in the conclusion of the court below; that "this proviso had respect only to the interest that accrued before the principal became due." What are the words?—"to pay the three hundred and sixty-one dollars and eighty-nine cents on the death of Mrs. Hunter, with lawful interest on said sum, provided the same (*i. e.* the lawful interest) shall not exceed eighteen months" (interest.) The time of payment is the death of Mrs. H. This was an uncertain and future event; if less than eighteen months intervened, interest for such time only could be recovered—and though it might be postponed for many years, yet the covenantor should be excused on payment of eighteen months interest only. That the parties so understood each other is evident from the indorsement on the agreement in 1820, (after the lapse of the eighteen months from the date of the instrument and before the death of Mrs. Hunter,) and this, on the authority of Cooke *v.* Booth, Cowper's Rep. 819, is entitled to much weight.

Will the proviso bear the interpretation contended for by

Mr. Troubat, that but eighteen months interest could be exacted at the time of actual payment, or at least demand, be that never so long after the principal was due? Surely the parties had in contemplation the performance of the agreement—the payment of the money, at the time fixed—Mrs. Hunter's death; and they say expressly it is then to be paid with lawful interest. It was not by the agreement made the duty of either party to ascertain the moment of Mrs. H.'s death—and I know no exception to the rule of law which requires the debtor to pursue his creditor and make a tender if he wishes to be excused from interest.

But the proviso limiting the interest, could in no event be injurious to Mr. Troubat. It was altogether for his benefit. He, as the *agreement states, had the property in his possession at the date of this instrument, and retained [*262] this part (three hundred and sixty-one dollars and eighty-nine cents) of the consideration in his hands. He had therefore the use both of the lands and the money. Shaller *v.* Brand, 6 Binney, 437—and see 442; Fasholt *v.* Reed, 16 Serg. & Rawle, 268; Hepburn *v.* Dunlop, 1 Wheaton, 201—all concur that the party being in possession of the land and deriving the profits of it is liable for interest. This is the ground of the decision below, as appears by the opinion filed with the record at the request of the defendant below.

The opinion of the court was delivered by

Gibson, C. J.—English decisions are unsafe guides in questions of interest here. In those decisions an agreement for the payment of interest has seldom been implied from circumstances which are constantly submitted by our courts to the discretion of a jury; and that class of cases in which the allowance of it is of right, has been sensibly enlarged by us. At the common law, it was not allowed in actions of debt, the damages being merely nominal; but as the penalty of a forfeited obligation was strictly demandable at law as a debt, relief was had in equity on payment of a compensation for the detention of what was due in equity; and the same measure of relief prevails since the jurisdiction of the chancellor, in

this respect, has been transferred to the courts of law. The consequence is, that interest is out of the question in England wherever there is no penalty at all, or one which is no greater in amount than the sum equitably due, because the relative inferiority or equality of the legal debt leaves no room for equitable intervention and the consequent imposition of terms. It might be supposed from what was said by the Chief Justice in Obermeyer *v.* Nichols, 6 Binney, 162, where a bond with a penalty was put as an instance of a debt bearing interest of course from the day of payment, that a single bill stands here, as it does in England, on a different footing. No distinction, however, is made in practice between a legal and an equitable debt, insomuch that interest is allowed even on a penalty where justice requires a compensation to be made for the detention of it; as is shown by Perit *v.* Wallis, 2 Dall. 255. In the analogous case of a promissory note, it was determined in Jacobs *v.* Adams, 1 Dall. 52, that interest runs from the day of payment, and the effect would be the same whether the recovery were in debt or damages. The rule however is supposed to be controlled in the present case by peculiar circumstances. The obligation was given for purchase-money retained by the obligor till the dower of the obligee's wife should be extinguished by her death or release, and stipulated to be paid on the happening of either of these contingencies. No release was tendered; and the obligor insists he should be charged but from the period of actual knowledge of the death. But the obligation was *broken by failure to pay on the day of the death; of which, not being peculiarly within the knowledge of either party the obligor was bound to take notice at his peril. A positive engagement to do a specific thing, is to be executed at all events; and even an obligation to perform on the doing of a specific act by the obligee, is forfeited, if not executed according to its terms, though notice of the precedent act be not given. Various instances of this are given in Com. Dig. L. 9; of which, I shall refer in particular, but to the case of Fletcher *v.* Pynfett, Cro. Jac. 102, in which the rule was applied to a condition to pay when the obligee should marry. The day of payment, then, being determined by the actual con-

[*263]

tingency, interest runs from it, by our practice, of strict right. It is said, however, that a particular equity may control the rule; and that detention till the obligor knows the debt to be demandable, cannot be vexatious or contrary to the will of the obligee whose supineness is strong evidence of acquiescence. But Shaller *v.* Brand, 6 Binney, 435, was the case of a more plausible, yet unsuccessful claim to exemption.

There an agreement was filed for "judgment, but no execution to issue till the title of the land for which the bond was given, should be perfected by the plaintiff;" yet interest was allowed for the interval in which the money was not strictly demandable, the implication from that circumstance, of an intent to suspend the interest, being rebutted by the defendant's enjoyment of the profits, and the absence of proof that he had kept the money lying dead for a single hour. Is not that, to say the least, the case before us? Granting it to be so in those respects, still the question is said to be settled by a stipulation in the obligation. That, however, evidently relates to interest accruing between the date of the instrument and extinguishment of the dower; and not to interest that might accrue between default made and actual payment. The object was to give the obligee a reasonable time to procure the release without compelling the obligor to hold the money at interest for an indefinite time; and neither party stipulated for more. In every aspect of the case, then, it seems the interest was properly allowed.

Judgment affirmed.

Cited by Counsel, 11 Wr. 79; 11 W. N. C. 295.
Cited by the Court, 9 C. 449; 8 Wr. 74.

[*264] *[PHILADELPHIA, APRIL 16, 1835.]

Willing *against* Perot.

Same *against* Same.

A. a resident of Calcutta died, possessed of a considerable amount in the American funds, which he bequeathed specifically to his sons upon various trusts.

Held, That a local administrator *cum testamento annexo, durante absentia*, was entitled to the fund, in preference to those claiming under the foreign executor.

THE first of these actions was trover for two certificates of United States three per cent. stock: brought by Richard Willing, administrator *cum testamento annexo* of Sarkies Ter Johannes, against Elliston & John Perot, in which a verdict was entered for the plaintiff for one hundred and eighteen thousand dollars damages, subject to the opinion of the court on the whole evidence.

The other was *assumpsit* to recover dividends received by the defendants on said stock in which a similar verdict was entered for the plaintiff for twelve thousand and fifty-one dollars and ninety-three cents.

The case appeared to be this:

Sarkies Ter Johannes, a resident of Calcutta, died on the 16th August, 1812, being the holder of a considerable amount of three per cent. stock of the United States. By his last will dated the 24th February, 1812, he bequeathed this stock specifically to his sons Johannes, Carapiet, Bectan, and Marterose Sarkies, in trust, after a period of ten years from his decease to transfer the same to his said sons, with limitations of survivorship in case of death without issue, which it is unnecessary here to mention: and appointed his widow and his said sons his executors.

The executors by letters of attorney dated the 18th November, 1812, authorized Elliston & John Perot of Philadelphia to receive the dividends of the United States stock.

[Willing *v.* Perot.]

Marterose Sarkies died on the 15th April, 1814, and Johannes Sarkies on the 27th December, 1816.

On the 28th March, 1817, Carapiet and Bectan Sarkies assigned all their stock in trade and personal effects to Alexander Colvin, Henry Mathew, and Aviet Agabeg, in trust, to pay creditors. The assignees by letter of attorney of the 8th May, 1817, appointed the Messieurs Perot their attorneys. Carapiet Sarkies died on the 30th November, 1817.

On the 23d September, 1817, William Fairlie and others, creditors of Johannes Sarkies & Co., issued a foreign attachment in this court, and attached the dividends of stock in the hands of the defendants as garnishees.

Bectan Sarkies being now the only surviving son and trustee under his father's will, on the 11th January, 1819, assigned to Fairlie, Bonham & Co., of London, and Fairlie, Fergusson & *Co., of Calcutta, his interest in the American funds under his father's will in trust to pay themselves debts [*265] due them by said Bectan Sarkies: and on the following day appointed Fairlie, Bonham & Co., trustees under a power in the will of his father; and by letter of attorney of the 13th January, 1819, authorized them to receive the interest or proceeds of said stock during ten years, from his father's death, and to apply the same as the will directed; and after the expiration of that period, to make over and assign the stock in the manner directed by the will.

Fairlie, Bonham & Co., on the 25th of January, 1820, substituted Messieurs Folwell & Comly, of Philadelphia, as their attorneys to receive the dividends on the stock.

On the 25th October, 1822, Bectan Sarkies, as surviving executor and trustee, under the will of Sarkies Ter Johannes, revoked all powers of attorney theretofore made by him as such executor and trustee, and appointed Aviet Agabeg of Calcutta his attorney under the will, who substituted the Messrs. Perot.

On the 19th February, 1826, Bectan Sarkies, as surviving executor and trustee aforesaid, constituted Aviet Agabeg his attorney with power of substitution, to prove the will, take out letters of administration in America, &c., and to sell and

transfer all or any part of the three per cent. stock of the United States standing in the name of Sarkies Ter Johannes. Agabeg on the 23d February, 1826, substituted Mr. Willing under this power.

Letters of administration, *cum testamento annexo, durante absentia*, to the estate of Sarkies Ter Johannes, were granted to Richard Willing, the plaintiff, by the register of wills for the city and county of Philadelphia, on the 14th of December, 1826.

By virtue of this administration the plaintiff claimed to recover the stock with its increase in the hands of the defendants. Defence was taken by Fairlie & Co., who claimed under the assignment to them by Bectan Sarkies of the 11th January, 1819.

It was argued by *Cadwalader* and *J. R. Ingersoll*, for the plaintiff; and by

Brashears and *Sergeant*, for the defendants.

Per Curiam.—The principle of this case was settled in Brodie *v.* Bickley, 2 Rawle, 431. The contest is, in fact, between a local administrator and the representatives of the executor at Calcutta, who set up his title as a defence to an action against a third party in possession of the assets. In any other community than one which has heretofore suffered an action to be maintained on a foreign grant of administration, the question would not bear a moment's consideration. But the maintenance of such an action here could have respect but to cases where there is no local administrator; for it certainly was not intended to postpone his title to one derived from any foreign [*266] authority whatever. Any other construction *would put the domestic creditors in the power of foreign agents and foreign laws, whose disposition of the assets might be less favourable to them; and the duty payable to the state under the collateral inheritance law, would be evaded altogether. No foreign power can step between the administrator and the assets. They must be collected and administered in

the first instance, to satisfy domestic charges, and afterwards distributed, or, should circumstances require it, remitted to the foreign executor to answer the same purpose there. But he can obtain them only from the local administrator, into whose hands they must go in the first instance; and the defence made here, is therefore, not to be sustained.

Judgment for plaintiff.

Cited by Counsel, 5 Wh. 365; 2 Barr, 159; 6 Wr. 469; 20 S. 348.
Cited by the Court, 11 S. 480.

[PHILADELPHIA, APRIL 16, 1835.]

Thomas *against* Riegel and Others, Executors of Rothrock.

IN ERROR.

Debt on bond against executors. Plea, that before suit brought defendants were discharged on settlement of their accounts by decree of the Orphans' Court, unreversed and unappealed from, and so they were not executors at time of suit brought, alleging that they had fully administered. Replication, that before their discharge they had delivered up certain goods and bonds of the estate, without consideration and without accounting therefor, alleging a *devastavit*, by means whereof the estate at the time of their discharge was insufficient to pay debts, and that defendants had not fully administered. Demurrer to this replication.

Executors who have appropriated the assets of the estate to the payment of legacies instead of the debts of the testator, and upon settling their administration account afterwards in the Orphans' Court, have obtained their discharge from their executorship, remain liable notwithstanding to the creditors for the assets so applied to the payment of the legacies.

ERROR to the Common Pleas of *Northampton* county.

The action was debt against Matthias Riegel, Jacob Rothrock, and Michael Smith, executors of Isaac Rothrock, deceased, upon a bond of the testator, dated November 27th, 1817, for two hundred and sixty-four dollars. The defendants pleaded a special plea, which in substance amounted to this: that on the 18th of December, 1821, Riegel & Smith filed an administration account in the register's office of Northampton county, exhibiting a balance due from the estate to them of

eighty-nine dollars and seventy-five cents; and that on the 24th of the same month the said Jacob Rothrock filed a similar account, exhibiting a balance due to the estate of one dollar and five cents, which accounts were on presentation to the Orphans' Court referred to three auditors, who reported that they found the account of Riegel & Smith correct in all its items; and that [*267] there *was a balance due by Jacob Rothrock to the estate of twenty-nine dollars and seventy-nine cents; which report was confirmed by the said court. That on the 1st of February, 1822, on petition, the said Matthias Riegel was discharged by the said court from his executorship, and afterwards on the 19th of April, 1822, the said Michael Smith was likewise discharged: that afterwards on the 29th of August, 1823, the court accepted the resignation of the said Jacob Rothrock, vacated his letters testamentary, and awarded letters of administration with the will annexed, to Philip Lynn, and ordered the said Jacob Rothrock to deliver over to him the effects unadministered and to account with him for the estate previously administered, and to pay over the balance: that letters of administration *cum test. annex.* were afterwards granted by the register of wills to the said Philip Lynn: that the said Jacob Rothrock on the 30th of December, 1823, filed in the register's office a further and final account, exhibiting a balance in his hands of two dollars and sixty-five cents, which being referred to auditors on presentation to the Orphans' Court and found to be correct, was confirmed; and that the said Jacob Rothrock had duly accounted with the said Philip Lynn, and delivered the unadministered estate over to him according to the decree of the court.

The defendants pleaded, that before the institution of this suit, they had been respectively discharged and dismissed by the Orphans' Court; and that they were not at the time of the institution of this suit and yet are not executors of the last will of Isaac Rothrock, but that before the institution of this suit they had respectively fully administered all the estate of the said Isaac Rothrock which came to their hands respectively.

To this plea the plaintiff replied in substance that before the

defendants or either of them had been discharged, to wit, on the 24th of August, 1819, they had in their possession divers goods, chattels, and credits of the decedent, (describing them,) and also three bonds, one of John Rothrock for one thousand two hundred and eighteen dollars and seventy-five cents, one of Jacob Rothrock for one thousand two hundred and eighteen dollars and seventy-five cents, and the third of Joseph Rothrock for one thousand two hundred and eighteen dollars and seventy-five cents; and that being so possessed they had afterwards on the 24th of August, 1818, delivered up the goods and chattels above mentioned to Gertrout Rothrock, the widow of the deceased, and the bonds above mentioned to the respective obligees, without receiving any consideration therefor and without accounting for the same, alleging a *devastavit* thereof, by means whereof the estate of the said Isaac Rothrock in the hands of the said executors at and before the time when they were discharged by the Orphans' Court, was insufficient to pay the debts of the deceased, traversing that defendants had fully administered.

The defendants demurred specially to this replication, and assigned for cause:—

*First—That the replication in its commencement professes to answer the whole of the plea, and does not afterwards answer the material allegations of the plea, particularly in this:— [*268]

That it does not answer the allegation and averment, that after the defendants took upon themselves the burden of the last will and testament of Isaac Rothrock, deceased, they respectively settled and filed their accounts of the execution of the said last will and testament of the said Isaac Rothrock, deceased, and of their administration of the estate committed to them: which accounts after presentation to and settlement in the Orphans' Court of Northampton county, were respectively duly confirmed by the said court, and that the decrees of the said court in the premises, remain in full force, unappealed from and unreversed.

Further. In that it does not answer the allegation and averments that the defendants were respectively before the

institution of this suit, discharged and dismissed by the Orphans' Court of Northampton county, from their office and appointment as executors of the last will and testament of the said Isaac Rothrock, deceased, which decree of the said court discharging and dismissing them from their office and appointment aforesaid, remains in full force, unappealed from and unreversed, and that they respectively were not at the time of the institution of this suit, and at the time of plea pleaded, executors of the last will and testament of the said Isaac Rothrock, deceased.

And further. In that it does not answer the allegation and averment, that on the 22d day of November, in the year of our Lord 1823, letters of administration of the unadministered goods, chattels, and credits, of the said Isaac Rothrock, deceased, with the will of the said Isaac Rothrock, deceased, annexed, were in due form of law, and according to the decree of the said Orphans' Court of Northampton county, made in the premises, and remaining in full force, unappealed from and unreversed, granted by the register, &c., of Northampton county, to Philip Lynn; and that the said Jacob Rothrock afterwards exhibited his further and final account, of the execution of the said last will and testament of Isaac Rothrock, deceased, which said further and final account, after presentation to, and re-settlement in the said Orphans' Court, was confirmed by the said court, the decree of which said confirmation by the said court, remains in full force, unappealed from and unreversed; and that the said Jacob Rothrock afterwards accounted to and with the said Philip Lynn, administrator as aforesaid, with the will of the said Isaac Rothrock, deceased, annexed for all and every the goods, chattels, rights, and credits, which had been previously administered by him, the said Jacob Rothrock, and did pay over the balance which remained due from him to the said Philip Lynn, as such administrator, and did deliver over, and pay to him, the said

[*269] Philip Lynn, as such administrator, *all and every the goods and chattels, rights and credits, title deeds, evidences, and securities, which were of the decedent, and which remained in his hands unadministered.

Second—For that the said Rebecca Thomas, hath not in and by her said replication, confessed and avoided, or traversed and denied, or attempted to put in issue any matter of fact, alleged by the defendants in their plea, above pleaded, but has introduced and attempted to put in issue matters of fact, not alleged nor necessary to be alleged, and that the replication is no answer to the said plea, but evasive and argumentative, &c.

Third—For that the allegations and averments, in the defendants' plea set forth, and which are therein well pleaded, that the defendants were respectively on the several days and times, in the said plea in that behalf mentioned, and before the institution of this suit, discharged and dismissed by the Orphans' Court of Northampton county, from their office and appointment as executors of the last will and testament of the said Isaac Rothrock, deceased, the said court having competent power, and authority, and jurisdiction, so to decree, which decree remains, and is in full force, unappealed from and unreversed, and that they, the said defendants, respectively were not at the time of the institution of this suit, and at the time of plea pleaded, executors of the last will and testament of Isaac Rothrock, deceased, but that before the institution of this suit, they had respectively resigned their said offices as executors, and been in due form of law dismissed and discharged therefrom, which said matters are not denied in the said replication of the said Rebecca Thomas, are a positive bar to the maintenance of this action.

Fourth—For that the alleged neglect and refusal as set forth in the said replication of the said Rebecca Thomas, to account for the whole of the goods, chattels, and credits, alleged to belong to the estate of the said Isaac Rothrock, deceased, and the alleged waste and destruction of the same, by the defendants, form no answer to the plea of the defendants, by them above pleaded, setting forth the final confirmation of the accounts of the defendants, as the executors of the last will and testament of Isaac Rothrock, deceased, by the Orphans' Court of Northampton county, and the discharge of the defendants from their office and appointment as such executors, and their

having accounted for the balance remaining to the administrator *de bonis non;* those matters, having been proper only for the consideration of the Orphans' Court, whose decree in the premises, as in the defendants' plea pleaded, being the decree of a court of competent jurisdiction, existing in full force, unappealed from and unreversed, cannot be inquired into this court, and in a collateral proceeding, such as is attempted by the plaintiff's replication.

Fifth—For that the said replication, contains matter upon which the said defendants cannot take or offer any certain and sufficient issue.

[*270] *Sixth—For that the said plaintiff hath not concluded her said replication, by putting herself upon the country, &c.

And for that, the said replication, is in various other respects defective, uncertain, informal, and insufficient, &c.

The court below gave judgment for the defendants on the demurrer.

And the error assigned was, that the court erred in entering judgment in favour of the defendants. The judgment on the demurrer should have been in favour of the plaintiff.

Jones, for the plaintiff in error, stated the principal question to be, whether executors who have disposed of the assets of the testator, in the payment of legacies, are liable to the suits of creditors, after they have been dismissed from their office, and their accounts settled and confirmed, and the period for an appeal has elapsed, if those assets should be wanted for the payment of debts; and contended that executors although discharged from the future administration of the estate, are chargeable as executors in respect of assets which were in their hands to be administered, and which were administered or wasted.

The plaintiff could not traverse the various averments of the plea cumulatively. He must either confess the whole, and avoid it by new matter, or traverse some averment in it, without which the residue of the matters of the plea would be insufficient. He adopted the latter course. The most material aver-

ment of the plea is, that the defendants had fully administered. By traversing this averment, the question is raised, whether the matters of record pleaded, are alone sufficient to discharge the defendants.

The decree dismissing the defendants does not divest them of the character of executors: it only exonerates them from liability to complete the execution of their trust. The title of the executor is by the will. A renouncing executor may resume the trust, should it become vacant. 1 Atk. 461; Toll. 69, 70. Neither of the defendants was dismissed. Each resigned, which may be called a renunciation with leave of the court. They are executors still for the purpose of being charged in respect to their own time, although they have not power now to go on with the further execution of the trust. It is no objection that they cannot now sue anybody. An executor *de son tort* cannot sue, yet he may be sued. 5 Rep. 31, a; 1 Saund. 265, n. 2. Nor that there is an administrator *de bonis non cum test. annex.* If an executor *de son tort* takes out letters of administration, he may nevertheless be sued as executor. Godolp. O. L. 94, 95. In Chandler *v.* Thompson, Hob. 265, b, the question is put, how an executor should be charged, who was executor for a time, and wasted. Nobody doubted that he might be sued. The question is resolved thus: sue the executor generally. If he plead the special matter, and that he delivered over the goods to his successor, (as the *defendants in the case at the bar have done,) the plaintiff may reply that during his [*271] time he wasted the goods to the value of the debt. In Keble *v.* Osbaston, Hob. 49, the plaintiff declared on a bill obligatory. The defendant pleaded that the obligee died intestate, and before suit brought, administration was committed to another, who administered and still doth. The plaintiff replied that before administration was granted, goods came to the hands of the defendant, who administered or converted them to his use. Held, the plaintiff might recover. S. P. Bradbury *v.* Raynal, Cro. Eliz. 565; Lawson *v.* Crofts, 1 Keble, 114, 157–8; Packman's Case, 6 Co. Rep. 19; see also, 1 Serg. & Rawle, 555, and 3 Rawle, 361, 370, 371, 379. In

Kendal *v.* Lee, 2 Penn. Rep. 482, the same principle is asserted.

The plaintiff in this case cannot see the defendants, except in their character of executors, and he cannot charge them for waste, without showing his interest in the assets. Therefore she must sue on the bond and charge them as executors, for they are only chargeable in respect of assets. The waste here consisted in paying legacies before debts. An executor who pays legacies, is always liable in respect of those legacies, notwithstanding his discharge. He may require a refunding bond, or take security in any other form. But these are personal. His successor could not sue upon it in his own name. His commission and security extend only to the assets remaining. 2 Penn. Rep. 485; 3 Rawle, 370, 372. If an executor pays legacies without security, or with one surety, or on security notoriously bad, how can he be reached, except in an action against him as executor? But if he delivers them upon security according to law, with good faith, he would be protected. But these are considerations personal to him, and could not arise in an action against his successor, and this liability of the executor is indefinite in point of time. As to the nature of the condition of the refunding bond, see act of 21st March, 1772, sec. 4; act 19th April, 1794. The averments therefore, in the plea that defendants had resigned, and an administrator appointed in their place, are not material.

As to the effect of the decrees of the Orphans' Court, on the accounts of the executors—

He argued that the last account of Jacob Rothrock, was an accounting *in pais*, and not protected by any decree, so that it appeared that at least the amount of his bond was now in hand, with the assent of the other defendants; that in regard to the other bonds they passed out of the defendants' hands, under circumstances which the law called waste; and that it is not protected by a decree of the Orphans' Court. Waste is not administration: nor a proper item in an administration account. If the defendants' argument be sound, what is the use of refunding bonds?

It was improper to introduce the payment of these legacies

into the administration account. 15 Serg. & Rawle, 60; 2 Penn. Rep. 424. Still their having done so, does not alter the rights of the parties. *In Sterrett's Appeal, 2 Penn. Rep. 424, the proper mode of stating the accounts is given. There should be two accounts stated: an administration account, and a distribution account of the balance. [*272]

The introduction into an administration account of items, proper only to an account between the executors and legatees, or next of kin cannot bind creditors; and so here the introduction of the legacies into the first account, and the decree of the Orphans' Court cannot have the effect claimed for it. App *v.* Driesbach, 2 Rawle, 287, is not to the purpose. There the action was brought by the residuary legatee, against the executor who was an heir, and claimed the sum demanded as an advancement. Upon the principle suggested, the distributive account should have been conclusive between the parties in that suit, for it was a contest between legatees. If the decree protects the defendants, what becomes of the refunding bonds? are they a dead letter? If they hold bonds taken in good faith, but the sureties have become insolvent, they should have rejoined the fact instead of demurring. The paying of legacies is not necessarily a tortious act. Tell. Ex. 307. Our acts of assembly allow it. The refunding bonds come in lieu of the assets in specie. They may be called contingent assets, or substitute assets, or assets if wanted, to pay debts at any time after. On this ground, a legacy is not attachable in foreign attachment. Law of Executors, 185; 2 Rawle, 227. Should it be said the executors have not taken refunding bonds, it may be replied, that it does not appear that they have not. At all events if they have not, it is their fault. As to the alleged formal defects, the replication admits everything that it does not deny, and a formal admission is not necessary.

The plea ought not to have concluded to the country, because the defendants should have an opportunity to excuse the alleged waste, by rejoining that it consisted in the payment of legacies, and that they took refunding bonds with two sufficient sureties at the time, but who have become insufficient.

Besides, on general principles the conclusion is right. It introduces new matter. Stephen on Pl. 190, 191, 203; 1 Saund. 103, a, b; Co. Lit. 126, a; Gould, Pl. 385, b, 388, sec. 23.

Brooke and *Porter*, for the defendants in error.

The defendants allege that the plaintiff's replication does not answer their plea. We have set forth a settlement and confirmation of the accounts in the Orphans' Court, on a resettlement by auditors; no part of this is answered, but they say that previously thereto, certain acts occurred, in consequence of which we are liable. Conceding *argumenti causa*, that they have in effect admitted our allegation of having presented our accounts, and been discharged, they have not answered, or put in issue the conclusion to which we have come. Our plea was, that true it is we once were executors, but that having settled our accounts in the manner provided by law, and to the satisfaction *of the proper tribunal, we [*273] have been discharged, and are therefore not answerable to this plaintiff in this action. We set forth the circumstances and conclude that so before suit brought, we were dismissed and discharged from our office and appointment as executors, the court having power, &c., and the decree remaining in full force, and that we were not at the institution of the suit, executors.

Under the act of 1819, (Purdon, 674,) the decree of the Orphans' Court is conclusive, no appeal having been taken within a year. These acts were pleaded by us, and it is no answer to the plea that previously we had committed a *devastavit*.

A plea must answer all it professes to answer. If it so professes and afterwards only answer a part, the whole is bad and plaintiffs may demur. 1 Chitty, 509. The rule as to replication is the same as to pleadings. An entire replication, bad in part, is bad in the whole, 1 Chitty, 617. The material allegations unanswered, are, 1st, the settlement of the accounts, and the decree of the Orphans' Court confirming them; 2d, the discharge and dismissal of the executors, and that they

were not and are not executors; 3d, the grant of administration *de bonis non* to Philip Lynn and Jacob Rothrock, accounting to him, and his account being confirmed in the Orphans' Court.

The mistake of the opposite side throughout, is in treating our plea as though it was merely *plene administravit.* This is not our plea. It is, that having fully administered, and our accounts being duly settled and confirmed, we were according to law discharged, and this we offer to verify. The traverse tendered, therefore, is to the inducement and not to the point offered to be put in issue. As to the second cause of demurrer; the rule that, when new matter is introduced into the replication, it must be sufficient in substance to destroy the opposite party's allegation, and, that in such case, they must conclude with a verification, is confined to cases in which such new matter is a fortification of the declaration, as in cases of infancy, the statute of limitation, &c.

Is the new matter here introduced into the replication, a sufficient avoidance of the defendant's plea? The discussion of this will necessarily embrace this, as well as the third and fourth causes of demurrer assigned.

We contend that everything in the shape of settlement of accounts and ascertaining the amount and extent of the liabilities of executors, administrators, and guardians, is to be determined in the Orphans' Court, and that the courts of common law are only to be resorted to, to enforce the payment of the amount so ascertained.

The 3d section of the act of 4th April, 1794, Purdon, 671, says, "Any executor or executors, administrator or administrators, with or without a copy of the will annexed, may with the leave of the Register's or Orphans' Court, in the respective counties, make a settlement of his or their accounts, so far as he or they shall have administered *the estate of the deceased, and also, with leave of either of the said [*274] courts, may be dismissed from the duties of his or their appointment, and surrender the residue of the estate under his or their care, to such person or persons as the said court may appoint." The register to take security in double the amount

of the real estate, and to administer the usual oaths, and grant administration of the unadministered part of such estate.

This is the provision in relation to voluntary resignations.

The 2d section of the act of the 27th of March, 1713, Purdon, 667, authorizes the court to dismiss administrators for embezzlement, waste, misapplication, &c., to revoke the administration, and grant new letters to other persons, who may bring trover or detinue for the goods and chattels, which came to the former administrator's hands and remain unadministered.

The 3d section of the same act, authorizes the court to require securities of executors in certain cases, such as a feme executrix intermarrying, an executor becoming insolvent, refusing to account, &c.

The act of the 4th of April, 1797, was intended to carry these provisions still further, and the preamble shows the evil intended to be remedied. Purdon, 670. The first section provides that executors and administrators, who are wasting or mismanaging an estate, may be required to give security, and if they fail to do so, the Orphans' Court may dismiss them and award administration *de bonis non* to be granted by the register, and order the former executor or administrator to pay over and deliver to his successor, "all the goods, chattels, rights, credits, title deeds, evidences, and securities, which were of the decedent, and which came to his or their hands, and remain unadministered, and to account with the said successor for all and every the goods, chattels, rights, and credits, which have been previously administered, and pay over the balance which shall remain due from him to such successor," as the court shall award and order; and provide how the payments and delivery may be enforced.

If it be said that there is a distinction between a resigning and a dismissed executor, because one is a responsible, the other a mismanaging one; the answer is that these acts make no such distinction. The first section of the act of 1797, does not use the term dismissed throughout. It directs the court to vacate the letters, to compel the first executor or administrator to deliver over, and if the superseded executor, &c., shall not

comply, then to sequester, &c. Evidently showing, that he is to be held continually liable in the Orphans' Court, until he does settle and pay, and deliver over.

In the 3d section, which is in strict connection with the first, the court is authorized to dismiss the executor or administrator from the duties of his appointment, and to direct the surrender over to the successor, &c. Rights and duties are correlative terms. If discharged from the duties, they are discharged from the rights and *responsibilities of executors, or the decree of discharge is perfectly nugatory. If [*275] they are still held responsible, they should have the rights of executors, and can they as executors sue for a chose in action due the decedent, after such a discharge? They must have all the rights of executors or none. There cannot be a divided right, or a divided responsibility, part existing in the dismissed executor, part in the administrator *de bonis non*, with the will annexed.

Creditors are as much liable, as legatees, to look to the settlement of accounts in the Orphans' Court; as well in solvent, as in insolvent estates. By the 9th section of the act of 4th April, 1797, Purdon, 672, the register is to give notice "to all legatees, creditors, or other persons," that the account of any executor is filed, and on a given day will be presented to the Orphans' Court for confirmation and allowance.

In the Massachusetts statute, which authorized the removal of an executor, residing out of the state, or who shall remove, &c., there is no provision requiring the superseded executor to account to the succeeding one. See 19 section, Mass. Stat.; 2 Shepperd's Touchstone, 226. Yet under this statute, it was held, that a plea of being dismissed, after suit brought was a good bar, without the averment of the appointment of a successor, Jewett *v.* Jewett, 5 Mass. 278–9, although the same objection in substance was urged there, that is here. Chief Justice Parsons, in that case draws the true distinction between the English law and ours. Here in case of deficiency of assets, the debts are paid *pro rata*, and the first administrator cannot retain, if he could, creditors would be injured. To allow the plea, will do no injustice, to disallow it might.

That an executor may be discharged, either on his own application or by adversary proceedings, is manifest from the acts cited. See Tremells *v.* Tremells, 17 Serg. & Rawle, 144. And the succeeding administrator is bound at his peril, to see to the due settlement of the accounts of his predecessor. It is alleged on the authority of the case of Allen *v.* Irvin, that there is no privity between the executor and the administrator *de bonis non;* we grant that there is not at common law, but the act of 1797 was passed to remedy that, and gives the right.

Take the cases in England, most like this—administration *durante absentia—durante minore ætate.* When the time arrives the administrator ceases, and he is to account to the executor. No action can afterwards be maintained against him. Brooking *v.* Jennings, 1 Modern, 174–5, to this effect, on a plea of fully administered. The new one, hath his remedy, if he hath wasted, but he is not liable to other men's suits. The reference in this case to Cro. Eliz. 43, is erroneous, the case is 3 Croke, 82. (Cro. Car. 88.) See also, Toller, 474.

In opposition to this doctrine, Packman's Case, 6 Co. 19, is cited, for Wentworth is a mere reference to that authority. If [*276] these cases *are law in England at this day, they are not in Pennsylvania, at least not in a case, where he has settled his accounts, and been discharged. The case of Lawrence *v.* Croft, Keble, 158, is not law at this day, for it says that the plea of fully administered, should be pleaded in abatement. Nor will the case of M'Fadden *v.* Geddis, 17 Serg. & Rawle, 336, make any difference. There a man as executor received a sum of money into his hands, and the will was afterwards set aside. He was sued as late executor, for the proportion of the money coming to the plaintiff, agreeably to the settlement of his account in the Orphans' Court, and no objection taken to the form of action. Kendall *v.* Lee, 2 Penn. Rep. 485, and Potts *v.* Smith, 3 Serg. & Rawle, 361, are inapplicable. In the first case, the first administrator had died, and the funds which came into his hands were the proceeds of real estate, for which special security was given. These were funds not em-

braced in the ordinary administration. In the latter, the administrator had died, and administration *de bonis non*, was granted to another. There, there was no privity, and no suit could be maintained. In this case, the act expressly directs the accounting and paying over to the successor, and points how it can be enforced. In the case of deceased executors or administrators, there is no continuance of the representative character, consequently no privity, and the provisions of the acts of 1713 and 1797, do not reach them; they remain as at common law.

The defendants are not discharged from pre-existing liabilities by their dismissal. They are responsible as far as legally liable. But it is in the Orphans' Court. That court has peculiarly the jurisdiction, given by the statute and it is convenient it should possess it.

The contest between the parties is as to the *quantum* of assets. How is that to be ascertained? In the Orphans' Court. If the bonds, goods, and chattels mentioned in the replication were assets, then they were either administered or unadministered. If administered, there is an end of the question; if unadministered, then by the express terms of the statute, he was to deliver them over to his successor. If administered, the Orphans' Court have passed upon them and have not charged the defendants with them. They are included in the inventory. The form of the administration bond, (act of 19th April, 1794, sec. 1, Purdon, 401,) requires the accountant to make a true and just account of his said administration, "and all the rest and residue of the said goods, chattels, and credits which shall be found remaining upon the said administrator's account, the same being first examined and allowed by the Orphans' Court, &c., shall deliver and pay to such person or persons, &c., as the said Orphans' Court by their decree and sentence shall limit and appoint." No suit can be maintained in the Common Pleas until the account is settled in the Orphans' Court. Even in a suit for a legacy on the plea of the want of assets, the Common Pleas are bound to *stay proceedings, and auditors are to be appointed to settle the account. [*277] (Act of 21st March, 1772, sec. 3, Purd. 566.)

By the 14th section of the act of 19th April, 1794, Purd. 404–5, the power is expressly given to the Orphans' Court, to appoint auditors to settle and adjust the rates and proportions of the remaining assets whose report, if approved by the court, shall be confirmed, and the executors or administrators shall pay the creditors accordingly.

The whole scope of the Orphans' Court laws show that the question as to the *quantum* of assets is appropriately within the power of that court.

The case of App *v.* Dreisbach, 2 Rawle, 287, is something similar to this. That was a case of testacy, and the executor said he did not charge himself with a particular sum of money, because it had been arranged between him and the testator in his lifetime. This was denied, but because it had been acted on by the Orphans' Court, and unappealed from, it being a matter within their jurisdiction, it could not be overruled in a suit in the Common Pleas. See also McPherson *v.* Rees, 2 Penn. Rep. 52—a debt released cannot be recharged.

But it is said that legacies ought not to be introduced into the accounts, and McCoy's Appeal, 15 Serg. & Rawle, 60, is cited. That is a mere direction as to what is the proper mode of stating an account. The case of M'Cullough *v.* Montgomery, 7 Serg. & Rawle, 31, is also cited. That case was decided, when it was supposed that an account settled in the Orphans' Court, was not conclusive. And although there is a pretty strong indication of an opinion that the Orphans' Court have not jurisdiction to compel the payment of a legacy, yet upon the subject of whether the account would be conclusive against the legatee, even of the payment of a debt, the court give no opinion. The court say it is not conclusive of the payment of a legacy. Here, however, no credit is taken for a legacy. But the accountants say that they do not charge themselves with certain sums, because the bonds and goods were given up to those persons pursuant to the will. It is an omission to charge themselves with assets for the reasons stated. And surely the question whether they were chargeable with assets was a subject legitimately within their jurisdiction.

See Judge Huston's opinion in Sterrett's Appeal, 2 Penn.

Rep. 424, in which it is expressly said, it is the duty of the Orphans' Court to allow to executors and administrators, in the settlement of their accounts, a credit for moneys paid to heirs and distributees.

If the Orphans' Court had jurisdiction of the subject-matter, it was for them to say what was proper and what was not proper to be introduced. The question is not what this court would have done on appeal, but what has been done.

There is no reason for any distinction between the conclusiveness of the settlement as to creditors and as to legatees here —in *England there is. There, as to legatees, the set- [*278] tlement before the ordinary is binding. But as to creditors, it is not. Here the decree of the Orphans' Court is binding on all.

Here we aver, that we settled with Lynn, the succeeding administrator, and paid over and delivered to him all in our hands. This is not denied; and it will be observed that after Smith and Riegel were dismissed, Jacob Rothrock was the remaining executor, and he was subsequently dismissed, on an adversary proceeding against him.

That the decree of the Orphans' Court was conclusive, if the subject-matter was within their jurisdiction, the defendants' counsel cited M'Coy *v.* Porter, 17 Serg. & Rawle, 59; M'Fadden *v.* Geddis, Ib. 336; M'Pherson *v.* Cunliff, 11 Serg. & Rawle, 422; M'Grews' Appeal, 14 Serg. & Rawle, 396; Heager's Estate, 15 Serg. & Rawle, 65; App *v.* Dreisbach, 2 Rawle, 357; M'Pherson *v.* Rees, 2 Penn. Rep. 521.

Is there any question that, if a creditor had come forward at the time, and objected to the account as stated, on the ground that these assets were not brought in, the Orphans' Court could have charged them against the accountant, upon their liability to account for them being made to appear? If so, then the time for appealing having gone by, the account is conclusive. Suppose there could be recovered twenty-five per cent. on these bonds—is the Common Pleas the tribunal to distribute this among the creditors, *pro rata?*

The current of authorities of late years has placed the settlement of accounts of decedents' estates in the Orphans'

Court, as in every respect the most suitable and convenient, and as the mode settled by law. The Orphans' Court settles what is the balance of the estate, and the Court of Common Law can only be resorted to for compelling payment of such balance to those entitled. A regard for consistency in our decisions, and for maintaining the security derived from a settled course of adjudication, demands that this system should not be departed from, and the profession and the community again launched on an ocean of uncertainty without chart, compass, or rudder.

The balance in a guardian's hands, cannot be sued for until his account is settled in the Orphans' Court. Bowman *v.* Herr's Executors, 1 Penn. Rep. 282; Nutz *v.* Reutter, 1 Watts, 229.

The following principles laid down in English treatises, will show the course of proceeding there, and the difference between that country and Pennsylvania, in regard to the discharge of executors and administrators, and the effect of such discharge.

In England, when executors account, they can be discharged, "make a due account thereof, and receive an acquittance." Swinb. pt. 6 s. 18, p. 465. But this will only discharge them in the spiritual court, but not of suits at common law, where every particular must be again proved. Toller, 494. Where the object of the executor or administrator is to make his ac-
[*279] count, all the *legatees or parties in distribution are to be cited to appear at the making of the account, for it shall not be conclusive on such as shall be absent, and have not been cited. Swinburn, pt. 6, sec. 20, p. 467; Williams, 1264; 4 Burn's Ec. Law, 426, 8th ed. 487. When an executor or administrator is called upon by any one party to account, he shall cite the legatees or next of kin, in special, and all others in general, having or pretending to have an interest, to be present if they think fit, at the passing of the same, and then on their appearing or contumacy in not appearing, the judge shall proceed. 4 Burns, *ut sup.* Williams, 1264.

After the investigation of the account, if the ordinary find it true, and perfect, he shall prouounce its validity, and in case

all parties interested as above mentioned, have been cited, such sentence shall be final, and the executors or administrators shall be subject to no further suit. 4 Burns, 428, 8th ed. 487; Swinburn, part 6, sec. 21; Williams, 1266. The effect of the settlement, is that the executor having well and faithfully performed his duty, and made his account, ought to be acquitted and discharged from further molestation and suits, as one that hath fully administered and finished his office. Swinburn, pt. 6, sec. 21, pl. 2, p. 419. Neither is he to be called by the ordinary to any further account, and this discharge cannot be obtained till he has fully accounted. Ib. pl. 3.

A creditor may cite the executor or administrator before the ordinary, to settle his account, but he cannot call for vouchers, or offer objections to the account. In respect to him, the oath of the party is at once conclusive. Such litigation would be altogether fruitless, as that court has no authority to award payment of a debt. Noy, 78; Williams, 1265; Toller, 495. The creditor's only object in such a proceeding is to gain an insight into the fund previously to his proceeding in action at common law. But a bill in equity for the discovery of assets is the more usual as it is the more effectual remedy. Toller, 489; 2 Fonbl. 2d ed. 414, note. In regard to distribution, as the act of parliament contains no negative words, equity has concurrent jurisdiction with the ordinary, and being armed with larger powers, affords a more effectual relief. 1 Vernon, 134; Mathews *v.* Newly, Williams, 1268. Equity considers an executor as a trustee, &c. Toller, 479, sec. 4, ch. 10, Book 3.

If the executor finds the affairs of his testator so complicated as to render the administering of the estate unsafe, he may institute a suit against the creditors for the purpose of having their several claims adjusted by the decree of the court. 2 Williams, 1172, pt. 5, Book 1, c. 2, citing 2 Vernon, 37; Fonbl. Book 4, pt. 2, c. 2, sec. 3, note n.

It is true that Lord Talbot said that such suits have been discountenanced (Cases Temp. Talbot, 224; Morrice *v.* Bank of England,) but his doctrine has since been overruled in practice. Williams, 1177.

[Thomas *v.* Riegel *et al.*]

[*280] *Where the court (of Chancery) has pronounced a decree for account and payment of debts and legacies, under which all the creditors or legatees may claim, the executor or administrator may obtain an injunction to restrain proceedings by a separate creditor or legatee, either at law or in equity, as it would greatly embarrass the just administration of the assets. Williams, 1176; Mitford's Plead. 168, 4th ed.; Drewry *v.* Thacker, 3 Swanst. 541–4. See also Williams, 1177; Sutton *v.* Mashiter, 2 Sim. 513; Paxton *v.* Douglass, 8 Vezey, 520; Perry *v.* Phillips, 10 Ib. 39–40; Clark *v.* Ormond, Jacob, 122. (Where it is held that a legatee may make the application.) Largan *v.* Bowen, 1 Scho. & Lef. 299.

And see the rule: "It is obvious that an executor or administrator may compel the creditor to take an equal distribution of assets, and the courts of equity have accordingly of late years allowed friendly bills to be filed against executors and administrators, which are in truth suits by them in the name of a creditor against themselves." Williams, 1177, 8, and *notis;* 18 Vezey, 469; 1 Camp. 147.

Where a creditor has proceeded at law before an injunction is granted, he shall be allowed the costs of such suit at law previously made. But he shall not be allowed the costs of further proceedings after actual notice of the decree. Williams, 1179, and cases there cited in notes.

Thus it seems in England in order to do justice, the parties must go into a Court of Chancery to have the accounts finally closed and a decree of distribution of the assets made; and when this is done, the executor or administrator is discharged and acquitted from further suits at law.

Here our Orphans' Courts are invested by statute with the powers which the British courts of equity have been obliged to assume from necessity. In our Orphans' Court notice is always given as directed by law, which is notice to all the world. See App *v.* Driesbach, 2 Rawle, 287, in which the sufficiency of this notice is held.

Reason, policy, the peace and safety of society, require that a settlement in the Orphans' Court remaining undisturbed for upwards of ten years, should be conclusive on everybody.

[Thomas *v.* Riegel *et al.*]

As to the 5th cause of demurrer; it has already been answered in the argument in relation to the preceding causes of demurrer. There is no certain or sufficient issue tendered by the replication.

That the replication should have concluded to the country, see 2 Chitty, 657–658. The forms of replications to plead *ne unques executor*, and *plene administravit*, with replication of a *devastavit*.

If the court should be of opinion that these defendants are mistaken as to the effect of their discharge, then to do justice a withdrawal of the demurrer should be permitted, with liberty to plead so as to ascertain the liabilities of the defendants respectively, and the nature and extent thereof.

*The opinion of the court was delivered by [*281]

KENNEDY, J.—The principal, and indeed as it appears to me the only question worthy of consideration in this case, is, whether executors who have appropriated the assets of the estate to the payment of legacies instead of the debts of the testator, and upon settling their administration account afterwards in the Orphans' Court have obtained a discharge from their executorship, remain liable notwithstanding, to the creditors for the assets so applied to the payment of the legacies.

It is proper to bear in mind that the discharge of the executors in this case from their office as such, was upon their own application and wish to resign the same; and not because they were found to be wasting or mismanaging the estate, and had failed to give security according to an order previously made upon them by the Orphans' Court to that effect. The surrender then of their office being voluntary, it seems to me that they were only required by the act of assembly of 1797, to pay or deliver over to the administrator *de bonis non*, the residue of the estate which remained in their hands unadministered, and inasmuch as more than a year, the time for which the payment of legacies is suspended by the act of assembly, had elapsed after the death of the testator before the resignation of the executors, it could not perhaps be well said that

whatever of the estate they had appropriated to the payment of legacies, although improperly so applied, formed any part of the residue thereof mentioned in the act as remaining in their hands unadministered. Besides, after the expiration of the year, and having paid all the debts within their knowledge against the estate, it was their duty to pay the legacies, if they had assets, upon receiving from each legatee a bond with at least two sufficient sureties, as the law then stood, conditioned for a return of his legacy, or so much thereof as should be wanting thereafter to pay debts subsequently appearing against the estate: so that if the defendants in this case after the expiration of the year, without any knowledge of the plaintiff's claim, upon receiving the requisite bonds and sureties from the legatees, paid to them all the assets remaining in their hands unadministered, they would only be liable to the plaintiff or other creditors giving notice subsequently of their demands, as long as the legatees or their sureties should remain solvent and able to refund. But if an executor, after notice given him of a debt against the estate, will appropriate the assets to the payment of legacies instead of such debts, he will be responsible to the creditor, whether the legatees and their sureties in the refunding bonds continue to be good or not. So if he pay legacies without taking refunding bonds, or without taking such security as shall be considered good at the time, he will be liable for the amount so paid to creditors, if there be any unpaid who shall seek payment afterwards of their debts: [*282] because it is a clear violation of *duty on his part either to pay legacies in preference to debts made known to him, or to pay legacies without taking such security as is required by the act of assembly: which I believe, according to the act now in force on this subject, ought to be approved of by the Orphans' Court. Hence it is not only reasonable but just, that if he pays legacies without taking such security on behalf of creditors as the law requires, that he should stand himself in the place of such security and be responsible to the creditors of the estate in the same manner and to the same extent as if it had been taken. And this I think may be considered a sufficient answer to a suggestion made by the counsel

for the defendants, that their clients were protected against the claim of the plaintiff by the statute of limitations. For as we have no act of assembly barring a suit on a refunding bond, and protecting the sureties from their liability under it after any specific length of time, I do not see how the defendants can claim protection on such ground. They must be considered liable to the creditors at least as long as the sureties in the refunding bonds would have continued to be liable to them, had they been taken. And if they have failed to take such bonds, they have failed to perform their duty, and have certainly no right to claim to be placed in a better situation than if they had done all that the law required of them.

The plea of the defendants as it appears to me amounts to nothing more than *plene administraverunt*, and would have been bad and insufficient, notwithstanding all the special matter set forth in it, had not the averment to this effect been inserted in the conclusion of it. The defendants might have given in evidence all the special matter stated in their plea, under the plea of *plene administraverunt*, according to the principles laid down in Brooking *v.* Jennings, 1 Freeman's Rep. 150, ca. 171; s. c. 1 Mod. 174; Garter *v.* Du, Ib. 13, Ca. 12; Anon., 1 Salk. 313, reported George *v.* Pierce, 7 Mod. 31. The replication therefore of the plaintiffs which goes to show that the defendants had not properly administered all the assets which came to their hands, but on the contrary had misapplied and wasted the same to an amount more than sufficient to pay the plaintiff's demand, by paying legacies with them, was an appropriate and pertinent answer to their plea, and if true sufficient to avoid it. Accordingly it is laid down in Packman's Case, 6 Co. 19, that "if an administrator waste goods and afterwards administration is committed to another, yet any debtee shall charge him in debt, and if he pleads the last administration committed to another, the plaintiff may reply that before the second administration committed, he had wasted the goods."

This principle was also agreed to by three of the judges in Brooking *v.* Jennings, 1 Freem. 150, Vaughan, Chief Justice, dissenting. In Chandler *v.* Thompson, Hob. 266, this question

was debated, though not decided, but the court say, "perhaps [*283] he (meaning the *creditor) may have an action against the former executor for so much as he had not lawfully administered." And in Oxford *v.* Rivett, Cro. Car. 79, 93–4, although the point was not directly made and decided, yet it seems to be plainly inferrable from what is there said by the judges, that if the defendant who had been administratrix *durante minore ætate* of the executor appointed by the will, had been found guilty by the jury of a *devastavit* during her administratorship, and before the executor attained full age, that she would have been liable directly to the plaintiff in the action who sued as a creditor of the testator. It is true that in opposition to this doctrine, Chief Justice Vaughan is reported in Brooking *v.* Jennings, according to 1 Mod. 174–5, to have said, "when an infant executor comes of age, the power of an executor *durante minore ætate* ceaseth; and the new executor is then liable to all actions; if the former executor wasted, the new one hath his remedy against him; but he is not liable to other men's suits;" in which Atkins, Justice, is said to have concurred. But in Freeman, 150, where the case is also reported, no mention is made of such opinion having been expressed by Chief Justice Vaughan. On the contrary, it is said "that three of the justices did seem to agree, that if an executor *durante minore ætate,* commits a *devastavit* and then obtains a release from the heir, (but meaning the rightful executor,) being come of age, that this will not secure him against the creditors who had once a right of action attached in them, which shall not be divested by his release;" of which Chief Justice Vaughan is merely reported to have doubted. So far then as the weight of judicial authority or opinion is entitled to regard on this point, it seems to be in favour of the creditors having the right to maintain their respective actions directly against the first executor or administrator when he has committed a *devastavit.* But it has been objected that this would defeat the provisions of our act of assembly, which requires the assets to be apportioned among debts of the same grade, according to the order therein prescribed, when they are found to be insufficient to pay the amount of the several grades. The case of Jewett

v. Jewett, 5 Mass. 275, has been cited and relied on to sustain this objection, in which the Supreme Judicial Court of Massachusetts held, that to an action against an administrator, it was a good plea in bar that after the commencement of the action against him he had been removed from office by the judges of probate; because by the laws of that state the creditors of a deceased were to be paid *pari passu*, excepting debts due to the United States, to the commonwealth, and charges on account of the last sickness and funeral of the deceased; and in order, as the court say, that this might be effected, it was necessary that all the assets unadministered should be brought into the hands and possession of the administrator for the time being And it seems from the case of Coleman *v.* Hall, 12 Mass. 570 that the administrator has the right, and indeed that it *is his duty to apportion the assets at any period, how- [*284] ever late, when he shall have discovered that the estate is insolvent; even in regard to judgments obtained against him for the whole amount of the debts therein claimed, at a time when the assets were amply sufficient to pay all the debts which had then come to his knowledge. The law of this state however has been held to be different in this latter particular; for where an executor or administrator having assets sufficient to pay all the debts within his knowledge, is sued for a debt, and judgment rendered against him for the amount thereof, but before it is paid by him, other debts of equal or even superior grade are made known to him, still he is bound to pay it, and will be justified in doing so, out of the assets in preference to these latter debts coming to his knowledge after the rendition of the judgment. Besides, by our act of assembly on this subject, it is the duty of the executors or administrators, whenever the assets are insufficient to pay the debts of the deceased, to apply to the Orphans' Court of the proper county for the appointment of auditors to settle and adjust the rates and proportions of the assets due and payable to the creditors, in the order prescribed by the act; and no such application having ever been made by the defendants in this case, although they continued in the office of their executorship, two years beyond the time allowed by the act of assembly, for set-

tling and paying the debts of the estate, we are bound to presume that they considered the assets amply sufficient, and that they were so in fact, to pay all the debts against it. Indeed it is not alleged now by them that the assets were not sufficient for this purpose; and if the conduct imputed to them by the plaintiff's replication be true, that they paid legacies to a large amount, it is clear that they never could have thought the estate insolvent. It would seem then that there is no pretence for deciding on this ground that the plaintiffs ought not to recover in this action. But it may also be observed, that the defendants in this case were not removed from their offices for mal-administration, as was most probably the case in Jewett *v.* Jewett. This in most, if not in all cases, would certainly make it not only expedient but necessary for the safety of all those interested in the estate, that the party turned out of office for such cause should be made accountable immediately to the administrator *de bonis non*, for all errors committed by him in the administration of the estate which might ultimately prejudice the rights of those concerned. As such pressing necessity however did not exist in this case, it may as well be that the plaintiff should maintain her action directly against the defendants, in case they be liable in any course of proceeding for the payment, or for assets to make payment with, of her claim. This will certainly tend to prevent circuity of action, and at the same time to promote the speedy administration of justice, as well as to prevent the accumulation of costs unnecessarily, without producing the least injustice, that I can perceive, to any one. I am *therefore inclined [*285] to think that the replication of the plaintiff was sufficient to avoid the plea of the defendants, and that the court below erred in rendering a judgment on the demurrer in favour of the defendants. The judgment is therefore reversed; and I am strongly inclined to believe that we ought to render judgment for the plaintiff, notwithstanding the earnest declarations of the counsel for the defendants, that the merits of the case, when all the facts and circumstances connected with it are fully disclosed, will be found to be in favour of their clients; because unless they can either set aside the plaintiff's bond,

[Thomas *v.* Riegel *et al.*]

show payment, or repudiate the facts set forth in the plaintiff's replication, I confess that I do not see well how they are to escape from a recovery by the plaintiff. And if they can do either of these things, it is unaccountable that the demurrer should have been resorted to and relied upon. Such experiments are not to be encouraged, when made without any colourable grounds to support them; but as this case was not free from difficulty altogether, it is thought more advisable not to enter a judgment for the plaintiff, but to remand the cause to the court below, that the defendants may have an opportunity of withdrawing the demurrer by leave of the court there, and rejoining to plaintiff's replication, either by putting the facts of it in issue, or alleging some new matter in avoidance of it, for the trial whereof, when the issue shall be joined, a *venire facias de novo*, if necessary, is awarded.

Judgment reversed.

Cited by Counsel, 5 Wh. 63; 1 J. 81; 9 C. 467; 1 Wr. 326.
Cited by the Court, 7 Barr, 320; 3 O. 131, s. c. 11 W. N. C. 557.

*[PHILADELPHIA, APRIL 16, 1835.] [*286]

Corlies & Co. *against* Stanbridge.

Fletcher & Loud *against* The Same.

CERTIORARI.

A levy on personal property left in the defendant's hands by the request, and at the risk of the plaintiff, for the purpose of securing his claim, and to prevent a sale of the goods for the payment of other creditors, is fraudulent and void, as against a second execution creditor.

A. on the 25th May, 1829, issued a *fieri facias* to August Term, 1829, returned "levied on real and personal property, as per schedule annexed; the personal property left in possession of defendant, by request and at the risk of the plaintiff," and on the 23d of October, 1829, issued an *alias fieri facias* to November Term, 1829, returned "levied on lands on *fieri facias* to August Term, 1829, and condemned as per annexed inquisition."

B. on the 2d of April, 1830, issued a *fieri facias* returned levied, subject to

[Corlies & Co. *v.* Stanbridge.—Fletcher & Loud *v.* The Same.]

the lien of A.'s *fieri facias;* under a *venditioni exponas* on which, issued the 6th of April, 1830, the property was sold.

Held, that B. was entitled to take the proceeds out of court.

Quære, whether the issuing an *alias fi. fa.* and levy on real estate, followed by condemnation, is not itself an abandonment of a levy on personal estate, made under the *fieri facias?*

THIS was a *certiorari* to the Common Pleas of *Montgomery* county.

It was an appeal from the decree of the court below, awarding distribution of money made under a sheriff's sale.

The facts of the case were as follows:

On the 4th of May, 1829, Fletcher & Loud entered judgment in the Court of Common Pleas of Montgomery county, against Stanbridge, on a warrant of attorney accompanying a bond in the penal sum of thirty thousand dollars, conditioned for the payment of fifteen thousand dollars, dated February 18, 1829, and payable on demand with interest.

On the 11th May, 1829, Corlies & Co. entered a judgment against Stanbridge, in the same court, in the sum of six thousand dollars, on an indemnifying bond dated November 7, 1828.

On the 25th of May, 1829, Fletcher & Loud issued a *fieri facias* on their judgment to August Term, 1829, which was returned by the sheriff, as levied on real and personal property, as per schedule annexed, the personal property left in possession of the defendant by request, and at the risk of the plaintiff.

On the 23d of October, 1829, Fletcher & Loud issued an *alias fieri facias* to November Term, 1829, to which the sheriff [*287] returned levied, *on lands on *fieri facias* to August Term, 1829, No. 16, and condemned as per the annexed inquisition.

On the 2d April, 1830, Corlies & Co. issued a *fieri facias* on their judgment to April Term, 1830, No. 28, to which the sheriff returned that on the 5th day of April, he had seized and taken in execution certain personal property of Stanbridge, subject to a lien of a *fieri facias* returnable to August Term, 1829, No. 16, upon which a *venditioni exponas* was issued

[Corlies & Co. *v.* Stanbridge.—Fletcher & Loud *v.* The Same.]

returnable to April Term, 1830, at the suit of Fletcher & Loud, by virtue of which the said personal property was sold.

On the 6th of April, 1830, Fletcher & Loud issued a *venditioni exponas* to April Term, 1830, No. 33, requiring the sheriff to sell the personal property, levied on under the *fieri facias* to August Term, 1829, No. 16. To this, the sheriff returned that he had sold the personal property in the writ mentioned, (excepting thereout certain articles in the said writ described as personal property, which at the time of sale were determined to belong to the freehold,) for the sum of eighteen hundred and twenty-five dollars sixty-five cents.

On the 16th August, 1830, a rule was obtained on the sheriff by Fletcher & Loud, to pay over to them the money made on their *venditioni exponas*, and on the same day a rule on the sheriff was obtained by Corlies & Co. to pay over to them the amount of their execution, or show cause, &c.

On the 22d January, 1833, the court discharged the rule obtained by Corlies & Co., and made absolute the rule to show cause why the sheriff should not pay Fletcher & Loud, the money made on their *venditioni exponas*.

From this decree Corlies & Co. appealed, and assigned the following errors:

1st. Because Fletcher & Loud had lost any lien which they might have had by virtue of the *fieri facias*, and levy upon real and personal property, to August Term, 1829, No. 16, by issuing an *alias fieri facias* to November Term, 1829, No. 33, and levying on land which was condemned; this being a waiver of their lien on the goods, and an election to take real estate.

2d. Because by the delay of sale, and leaving the goods in the possession of the defendant by request, and at the risk of the plaintiff, it was a fraud upon Corlies & Co., another execution creditor.

3d. Because the only object of Fletcher & Loud, as appears by the proceedings, was to obtain a security for their debt, and not a satisfaction of it.

4th. Because the *fieri facias* of Corlies & Co. was a lien on

the goods levied upon, there not existing at the time of that levy any previous execution which bound them.

5th. Because, for these reasons, the decree should have been for *Corlies & Co., another execution creditor of the defendant, and not for Fletcher & Loud.

[*288]

It was argued by *Potts*, for Corlies & Co., the appellants, and by

Bradford and *Chauncey*, for Fletcher & Loud.

For Corlies & Co., the appellants, it was argued, that the errors assigned might be considered under two heads:

1. That Fletcher & Loud had lost any lien which they might have had by the *fieri facias* and levy upon real and personal property, to August Term, 1829, No. 16, by issuing an *alias fieri facias* to November Term, 1829, No. 33, and levying on land which was condemned. That it was a waiver of their lien on the goods, and an election to take the real estate. That by the *alias fieri facias* nothing was held but the land: that it was not competent for them to have two executions at the same time, or in other words, to hold the goods by one *fieri facias* and real estate by another. That the *venditioni* which followed the *alias fieri facias* was applicable to the land, and acted as an abandonment of the goods. That Fletcher & Loud, if they had intended to hold their levy on the goods, could have sold under the *fieri facias* and their *venditioni exponas* was not necessary, and if Corlies & Co. had not issued their *fieri facias* it was evident Fletcher & Loud would not have proceeded.

2. That the object of Fletcher & Loud, by their proceedings, was to obtain a security for their debt, and not a satisfaction of it; and was a fraud upon Corlies & Co.

That from the time Fletcher & Loud issued their *fieri facias* to August Term, 1829, No. 16, to the time when Corlies & Co. issued their *fieri facias* to April Term, 1830, No. 28, a period elapsed more than sufficient to have enabled them to obtain the fruit of their judgment by a sale. That in connection with this delay, take the fact of the order to the sheriff to leave the goods in the defendants' possession, by request, and at the risk

of the plaintiff, which was equal to an order to stay the proceedings, there being no household goods in the levy; and to this add the further fact, that Fletcher & Loud did not make the slightest movement to obtain a satisfaction of their judgment, from the period of their *fieri facias* and levy, until the 6th of April, 1830, four days after Corlies & Co. had placed their *fieri facias* in the hands of the sheriff, with orders to him, to levy on the personal property, and sell as soon as the law would allow; the presumption of fraud upon Corlies & Co. becomes positive, and the legal conclusion that the only object of the proceedings of Fletcher & Loud was to obtain a security for their debt, and not satisfaction of it.

The lien of an execution levied on goods may be lost by the slightest negligence in pursuing it. The lien is not to be of indefinite duration. The law will not endure the levying of an execution on *goods, only as a security. The object of the execution must be for satisfaction, and not for security. The lien should not exist longer than may be necessary to enable the plaintiff to obtain the legitimate fruit of his judgment by sale. A levy with directions to proceed no further can be referred to no object but the creation of a lien, which the law does not tolerate. [*289]

Retention of possession ought to be considered a badge of fraud. Cowden *v.* Brady, 8 Serg. & Rawle, 510; Dean *v.* Patton, 13 Serg. & Rawle, 345; Barnes *v.* Billington, 1 Wash. C. C. R. 29; Eberle *v.* Mayer, 1 Rawle R. 366; Howell *v.* Alkyn, 2 Rawle R. 282; Com. *v.* Stremback, 3 Rawle R. 341; Hickman *v.* Caldwell, and Black *v.* Same, 4 Rawle R. 376.

These rules being applied to the facts of this case, will result in favour of Corlies & Co.

Bradford and *Chauncey* for Fletcher & Co. contended, as to the first error alleged, that the lien which they had on the real and personal property of the defendant by reason of the *fieri facias* to August, 1829, and the levy thereon was not inspired by the *alias fieri facias* to November Term, 1829, and levying on land which was condemned, because by law the sheriff is obliged under a *fieri facias* to levy first on the personal estate

and exhaust it before the land can be levied on, and therefore as a levy on personal estate was made under the *fieri facias*, no levy could be made on real estate, till the personal was sold, for the debt was *prima facie* settled by the levy. The levy on real estate under the *alias fieri facias* was consequently a nullity and void. For these points they cited Purd. Dig. 294; Hunt *v.* Breading, 12 Serg. & Rawle, 40; Dean *v.* Patton, 13 Serg. & Rawle, 346; Wood *v.* Vanarsdale, 3 Rawle, 401.

As to the remaining points alleged for error, they contended that there is no certain rule laid down as to how long goods levied on may be suffered to remain in the possession of the debtor with safety to the creditor. The cases have varied from one day to two years. As between the execution creditor and the debtor the lien remained. The only question which can arise is as to subsequent execution creditors. But here the object of delay was to benefit Corlies & Co. They received by our delay in selling from the use of the machinery more than three thousand eight hundred dollars: whereas Fletcher & Co. experienced a loss in the value of machinery by every day's use of it.

Reply. The delay did not benefit Corlies & Co. Their debt was reduced between the time of the levy on Fletcher & Loud's execution and theirs, but it was not by payments made from the use of the machinery, it arose from the sale of goods deposited in their hands as factors long antecedent to such levy—and such is the evidence in the cause.

The opinion of the court was delivered by

[*290] *SERGEANT, J.—If the plaintiff delivers an execution to the sheriff with direction not to levy at all, or not until further orders, it creates no lien on the defendant's personal property as against a creditor issuing and proceeding with a subsequent execution. Com. *v.* Stremback, 3 Rawle, 344. The rule is the same if there is a levy accompanied with instructions to stay proceedings. Ib. Hickman *v.* Caldwell, 4 Rawle, 376. In both cases the plaintiff's object is considered to be to obtain security, not satisfaction for his debt,

and the employment of an execution for this purpose is a perversion of its design, and a fraud against third persons. In the present instance, there was a levy on property left in the defendant's hands by the request and at the risk of the plaintiffs. In this disposal of the property there was no harm, because by our usage it is not necessary to the validity of the execution that the sheriff should, either by himself, or another person, keep possession, as by the English practice he is bound to do. Com. *v.* Stremback, 3 Rawle, 344. Watson on Sheriffs, 173, 176. He may leave the goods in the defendant's possession at his own risk, or, if the plaintiff authorize it, at the risk of the plaintiff. Ib. But still there must be a prosecution of the writ to a sale within a reasonable time. It is not necessary the sale should be before or even on the return of the writ. The sheriff may sell after the return of the writ, though out of office, and it is said, without a *venditioni exponas*. Ib. 189. But the plaintiff cannot suffer the levy to lie dormant term after term, and assert his priority only when another creditor attempts to enforce his rights. If he can, creditors may be kept at bay, the debtor permitted to retain the possession of the goods for an indefinite period, and the beneficial statutes and rules for the suppression of fraud frustrated. The great length of time which elapsed in the present case after the levy, without any step being taken by the first execution creditor, warrants the presumption, that his object was to use the execution to secure his claim, and to prevent a sale of the goods for payment of the defendant's debts—a design which the policy of the law deems fraudulent, and which renders the process void against the second execution creditor. The parol evidence abundantly manifests, that this, in fact, was the arrangement contemplated by the parties.

It is however, contended, that this case forms an exception to the general rule. And if it were shown, that Corlies & Co. knew of the first levy; that it was intended for their benefit by enabling the defendant to go on spinning cotton for their account; that they assented to the arrangement, and availed themselves of it, any objection to its validity would come with

an ill grace from them. But the defence fails in the most important link of the chain. The evidence does not show that Corlies & Co. ever agreed to the arrangement between Fletcher & Loud and the defendant. The most it proves is, [*291] that they knew of the existence of the execution *and levy, and received payments on account from the defendant during the interval. But there is nothing to show they agreed to the delay, or that it stood in any respect otherwise than at the plaintiff's risk. That being the case, it is impossible to distinguish the case from others falling within the operation of the general rule.

This view of the case renders it unnecessary to examine whether the issuing of the *alias fieri facias* to November Term, 1829, and levy and inquisition thereon, was not in itself an abandonment of the levy on the personal property under the *fieri facias*.

Decree reversed, and money awarded to the payment in the first instance of the debt due to Corlies & Co.

Cited by Counsel, 9 W. 335; 10 W. 214; 3 W. & S. 287; 7 W. & S. 66; 8 W. & S. 389; 8 Barr, 87; 10 Barr, 396; 14 S. 449.

Cited by the Court, 1 H. 412; 6 N. 167, s. c. 6 W. N. C. 264; 11 N. 261.

See Commonwealth *v.* Stremback, 3 R. 341.

[PHILADELPHIA, APRIL 16, 1835.]

Pennock *against* Hoover and Myers.

IN ERROR.

The commencement of a building under the act of the 17th of March, 1806, relating to the lien of mechanics and material men, is, the first labour done on the ground which is made the foundation of the building, and to form part of the work suitable and necessary for its construction; and that continues the same, notwithstanding the right of property in the ground and building may have been subsequently changed, or the plan be altered, so long as the original design of its character is retained.

A joint lien may be filed against several adjoining houses, the property of the same person.

A mechanic or material man doing work in, or furnishing materials for

[Pennock *v.* Hoover and Myers.]

the construction of two or more contiguous houses belonging to the same person, under a general request, without any specific contract for each house separately, may either file his claim for the amount against all the houses jointly, or he may apportion it among them according to the value or price of the materials or work, and file a separate claim accordingly. Per KENNEDY, J.

The lien of the mechanic and material man does not extend beyond ground necessary to the proper occupation and enjoyment of the house, according to the intention and design of the owner at the time of its commencement.

An assessment by the commissioners of Kensington District, for paving, is, under the act of the 3d of February, 1824, relating to taxes on real estate in the city and county of Philadelphia, a lien entitled to priority over the claims of mechanics and material men, and judgment creditors.

Where eighteen buildings were erected, *semble*, a claim against eight houses without properly designating them, is void for uncertainty, and cannot continue the lien after two years.

Where a claim was so filed, it was wrong to apportion the claim among all the houses.

In the case of a joint lien, each building is liable for the whole amount thereof; and no part of the proceeds of any one of the buildings can be applied to a subsequent incumbrance, so long as the joint lien remains unsatisfied.

A mechanic filed four claims, three of which were jointly charged, each on three of the *houses, and a fourth on four of the houses. Each claim embraced houses different from those charged in every other. [*292] Held, that each claim should be separately charged on the proceeds of the houses specified in it, and not the aggregate charged as one entire claim jointly on the thirteen houses embraced in the four several claims.

THIS case arose upon the exceptions to the report of the auditor appointed to ascertain and report the several liens affecting the fund arising from the sale of all the right, title, and interest of Hoover and Myers, in a lot of ground, with the eighteen unfinished messuages thereon erected, situated in the Kensington district, and sold under a *venditioni exponas* at the suit of Horatio B. Pennock, the plaintiff, who purchased the property at sheriff's sale, for the sum of four thousand six hundred dollars.

The material facts were as follows:

Sometime in the year 1828, Warnet Myers entered into a contract with General Cadwalader, the agent of Mrs. Penn, for the purchase of a lot of ground on the east side of Second street, between Phœnix and Master streets; containing in

front four hundred and thirty-eight feet six inches, and in depth two hundred and forty-eight feet to Hancock street, and extending on Hancock street five hundred and six feet and five and one-half inches. By the terms of the contract, a ground rent of eight hundred and twenty-one dollars was reserved on the lot; and it was stipulated that as soon as brick buildings should be erected on portions of the lot sufficient to secure the ground rent reserved, Myers should receive a deed in fee simple for the remainder of the lot. Myers accordingly proceeded to dispose of part of the ground, and in the winter of 1828, let out certain lots on Second street, under contracts, by which a certain proportionate ground rent was to be reserved to Mrs. Penn for each lot, to be paid by the under purchasers, who in the spring of 1829 began their improvements. The progress of these buildings was suspended about the beginning of June, 1829, and on the 16th of that month, Myers made an assignment of all his estate and effects to Benton Costen and Robert Jarden, in trust, for the benefit of creditors. On the 15th of August, 1829, the assignees made a formal surrender of the contract to General Cadwalader; and on the same day a new agreement in writing was made between Mrs. Penn, by her attorney, General Cadwalader, on the one part, and Samuel Hoover on the other part, by which the same lot was let to Hoover on the same ground rent that was provided in the former contract, and with the same stipulations and covenants. The name of Hoover was used in this instrument merely as a trustee for Myers, who in point of fact was the real party to the contract, and conducted all the business arising out of it. Shortly after the date of this agreement, Myers made arrangements for the construction on his own account of eighteen two-story brick buildings on the Second street front, and entered into contracts for the purpose with various mechanics. Circumstances again occurred to involve him in difficulties, and after the buildings had been got under roof, their progress was
[*293] suspended *again, partially resumed in the spring of 1830, and finally abandoned by him in the fall of that year. About this time a conveyance was made by General Cadwalader, of a portion of the ground, being two lots on

Hancock street, one two hundred and twenty feet, and the other two hundred and six feet in front, and extending in depth to Perry street, under contract to Thomas B. Longstreth, in consideration of the arrears of the ground rent then due, and a debt to Longstreth for work done to the buildings or some of them.

On the 6th of July, 1831, the buildings being still in an unfinished condition, the sheriff's sale took place of all the right, title, and interest of Hoover and Myers in the houses and that part of the lot which had not been conveyed to Longstreth, under which sale the fund to be distributed arose.

Upon this fund thus created, various claims were presented for taxes, judgments, and liens of mechanics and material men.

A claim was presented on behalf of the corporation of Kensington, for the expenses of paving in front of property on Second below Master street, with interest from October 12th, 1829.

The auditor reported that this claim, if entitled at all to payment out of this fund, must be postponed to the liens of the judgment creditors and mechanics.

This was the subject of exception by the commissioners.

Various judgments binding the real estate of Myers and Hoover were presented as affecting this fund: as to one of these judgments, in favour of Horatio B. Pennock, under which the property was sold, evidence was given before the auditor to show that it was entered in violation of the agreement between the parties. The bond which was the foundation of it, was given on the 10th of October, 1829, by Myers and Hoover, in the penal sum of two thousand four hundred dollars, conditioned for payment of the sum of one thousand two hundred dollars, and judgment was entered on the same day. Myers, whose competency as a witness was objected to by the plaintiff, but who was admitted by the auditor, testified, that being indebted to Pennock in a certain amount, it was proposed that he should give Pennock a ground rent of seventy-two dollars per annum, to issue out of the house and lot at the corner of Second and Phœnix streets, provided General Cadwalader would consent to accept an order from Myers, and

give a deed to Pennock, clear of the general ground rent. Some difficulty arising in obtaining this consent, Myers agreed to give the bond in question, and, as he stated, with an express and distinct agreement, that judgment was not to be entered up until the month of December following, and then only on failure to obtain the deed from General Cadwalader; and that in his existing position with regard to the mechanics and others engaged in the construction of the houses, he would not voluntarily have given a judgment to any person. The judgment, in this case, was entered in the Supreme Court, and, according to the testimony of *Myers, Pennock informed him that it was entered there, that it might not be seen by many. The agreement, of which parol evidence was given by Myers, was alleged by him to have been committed to writing at the time; and he testified that he had made diligent search for it previous to his examination without success, and that he believed it was lost or destroyed. It was contended on the part of other creditors, that, under these circumstances, the judgment of Pennock ought to be considered as a nullity, or, at all events, that it ought to be postponed to those liens which were obtained or accrued prior to the month of December.

[*294]

The auditor however, deeming himself bound to take every judgment to be duly entered and obtained, both as to consideration and date, until it should be opened or set aside by the court in which it was entered, treated the judgment as a valid one, but reported the testimony given by Myers in relation to it, that the court might take such measures as they thought fit, to determine the question of its regularity.

It appeared that the lot of which all the right, title, and interest of Myers and Hoover was sold by the sheriff, contained four hundred and thirty-eight feet six inches on Second and Perry streets, by one hundred and fifteen feet in depth, eighty feet five inches on Hancock street, and seventy-three feet on Perry street, by one hundred and three feet in depth. The buildings contained together two hundred and ninety-three feet eight inches on Second street; and it was testified by Myers that he intended to give the lots belonging to them an uniform

depth of sixty feet; thus leaving a front on Perry street with a depth of fifty-five feet. No fence or other line of demarkation was put up. The auditor considered a depth of sixty feet to be the usual and fair proportion of ground for houses of about sixteen feet front, and that all ground not covered by the buildings or included within the depth of sixty feet from the east side of Second street, ought to be considered as the proper subject of the lien of judgment creditors.

Testimony was produced of the absolute and relative value of the buildings with the accompanying lot, and of the vacant ground: the result of which was, that the whole value of the buildings and vacant ground being considered as four thousand six hundred dollars, the proportion of the buildings with sixty feet lots was about three thousand dollars. The auditor distributed the fund among the judgment and lien creditors, in the proportion furnished by this valuation.

The liens of mechanics and material men.

Several questions affecting these liens were made before the auditor, as to which he reported as follows:

Before enumerating in detail the claims classed under this head, *it is proper to dispose of two or three general questions affecting a considerable number of them. [*295]

1. The first and most difficult, both with respect to the facts and the law, is the question of the commencement of the buildings, under the act of 1806, which provides that the lien of the mechanics, &c., "shall not continue longer than two years from the commencement of the building thereof, unless an action for the recovery of the same be instituted, or the claim filed within six months after performing the work or furnishing the materials," &c.

In some of the cases hereafter to be mentioned, claims were not filed within six months after performing the work or furnishing the materials. It became therefore important to ascertain whether the buildings were sold by the sheriff before or after the expiration of the two years from their commencement; and several witnesses were examined before me upon this point, whose testimony was inconsistent and unsatisfactory with respect to dates, and the distinction of particular build-

ings. The best conclusion that I have been able to come to upon the facts is, that the house at the corner of Second and Phœnix streets, (No. 1,) the two adjoining houses, (Nos. 2 and 3,) and three other houses, (Nos. 13, 14, and 15,) were commenced, in point of fact, by the digging of the cellars, and the, at least partial, walling of the same, previously to the assignment made on the 16th of June, 1829, by Myers, and, consequently, more than two years before the sheriff's sale; and according to the decisions and general understanding, the commencement of a building, in law, takes place with the digging and walling of the cellars. It was contended, however, that whatever acts were done before the assignment were of no importance to this question: that the work then done having been abandoned by those who commenced it, and a considerable interval having elapsed before the new contract was made with Gen. Cadwalader, and the buildings undertaken by Myers, a new commencement ought to be considered as having taken place when the mechanics began their operations under his directions. It was stated in evidence, also, by Myers, that on his setting out with his buildings, after the new contract, he altered in some degree the plan of the cellars, which had been dug and walled; and this was urged as an additional reason for considering the commencement to have then taken place.

It appears to me, however, that this construction of the law involves greater difficulties than the opposite doctrine. I submit, that in general there can be but one commencement of a building, either in fact or law. It is possible that a case may arise, in which, in contemplation of a building, a cellar may be dug and walled, and even some of the carpenter's work done, and then a total abandonment may take place, and continue for such a period of time as fairly to entitle the renewed operations to the character of a commencement. In the case [*296] of The American Fire Insurance Company *v.* Pringle, 2 Serg. & Rawle, 138, C. J. Tilghman said, "Extreme cases may be put which are not within the meaning of the law. Houses are sometimes finished sufficiently for particular purposes, such as warehouses or stores, but not for dwelling-houses; and they may remain in this situation for years, and

then be completely finished. In such cases the completion of the work might be fairly considered as a new building, and ought not to be connected with the first part of the building, so as to give a lien from the original commencement. But the present is not such a case, and therefore the reasoning does not apply." In that case the building of the house was commenced by Mr. Mullowney, who sold it before it was finished to Pringle, by whom it was completed. And it was held, that the commencement of the building in law, was in the time of Mullowney, and the liens of the mechanics were referred back to that period.

This authority, which was recognized and enforced in Hern *v.* Hopkins, 13 Serg. & Rawle, 269, appears to me applicable and conclusive. The only difference in the cases being, that in the present there were some immaterial alterations in the plan of the buildings, after they came into the hands of Myers. This appears to me, however, not to affect the principle or sufficient to impair the rule laid down in the case cited. It may be remarked in addition, that the doctrine which would fix the legal commencement of the building at the resumption of the work, would be attended with much worse consequences for the mechanics; since in that case, an incumbrance created or suffered by the owner of the ground, between the period of the original commencement and the re-commencement would cut out all their liens; whereas by due diligence in filing their claims "within six months after performing the work," &c., they would obtain a preference relating back to the very first step in the commencement of the building, which no act of the landlord could impair or diminish.

I report, therefore, that the buildings which were in point of fact commenced by the digging and walling of the cellars previously to the new contract with Gen. Cadwalader, must be taken in law to have been commenced at that period—and, consequently, that the liens of the mechanics, &c., upon those buildings, of which the claims were not filed within six months after performing the work, &c., expired with the two years as against the other lien or judgment creditors.

2d The next general question arising under this head re-

specs claims filed against more than one building. It was contended that such claims were invalid; and that for work done or materials furnished, the claim ought to be specifically filed against each specific building. Whatever may be the rule where there are several owners of different adjoining buildings, it appears to me that where the buildings are the property of the same person, no serious evil or *inconvenience is [*297] experienced by joint claims. In the case of the lumber merchant, brickmakers, and others furnishing materials, it is always difficult, and sometimes impossible, to ascertain to which of a row of buildings the materials were actually applied; and even in the case of some of the mechanics, as the bricklayer who constructs a parapet wall between two houses, or the carpenter who prepares boards at his workshop, similar difficulties would exist. The acts of assembly do not forbid such joint claims, and in the absence of authoritative decision on the subject, I report that such claims are valid.

The great difficulty, in the case of materials furnished, and which is not removed by the filing of separate claims, consists in the proper apportionment of the amount to each house. Where direct evidence has not been furnished on this point I have made an equal division of the amount proved, which, as the houses were of nearly uniform size and structure, appeared to me as equitable a mode as any that could be adopted.

3d. The houses having, together with the lot, been sold for a gross amount, it was necessary, in order to do justice between the several claimants, to ascertain the value of each relatively to the amount, which, upon the evidence already adverted to, I had fixed as the proportion of all the buildings. For this purpose I requested to be furnished with the testimony of persons competent to judge of the value of such property. Three witnesses were accordingly examined, viz., John H. James, James Shaw, and Warnet Myers. The first two stated the value of each house, which together made the sum of ten thousand two hundred and twenty dollars. Mr. Myers, in company with Edmund Shotwell, made an average valuation, which differed very little in its results, producing in the whole the sum of ten thousand eight hundred dollars

[Pennock *v.* Hoover and Myers.]

Taking the first named valuation as sufficiently accurate, and reducing it to the measure of the purchase-money allotted to the whole of the buildings, viz., two thousand six hundred and eight dollars and seventy cents, the proportion of each house in that amount will be as follows, viz.:

No. 1	$299 72
2	146 77
3	146 77
4	114 86
5	114 86
6	114 86
7	114 86
8	127 62
9	127 62
10	135 30
11	135 30
12	135 30
*13	194 00
14	194 00
15	194 00
16	127 62
17	127 62
18	127 62
	$2608 70

[*298]

A claim for three hundred and ninety-one dollars and fifty-two cents, for bricks furnished, was presented by George Thorn.

The entries in his book were general. No particular house was charged. He filed a claim however in the District Court within the six months, against eight houses only, without specifying them. No evidence was given that the materials were furnished for any particular buildings. The auditor apportioned the amount of the claim *pro rata* among all the houses, allotting an equal sum to each house.

A claim for three hundred and thirty-six dollars and seventy-

five cents was made by Isaac Childs for work done as a stone mason to thirteen houses, beginning at the corner house, No. 1, thence extending north as far as and including No. 10; and also to Nos. 14, 17, and 18. He filed four claims on the 8th of March, 1830, viz., first for eighty dollars and seventy-nine cents against three houses; second, for ninety-nine dollars and fifty cents against four houses; third, for eighty dollars and seventy-nine cents against three houses; and fourth, for eighty dollars and seventy-nine cents against three houses. The claim was filed within six months after the work was done. The auditor upon the evidence before him reduced the claim to two hundred and seventeen dollars and thirty-eight cents, which he apportioned *pro rata* among the thirteen houses.

Samuel Thomas claimed four hundred and thirty-one dollars and sixty cents, for carpenters' work to Nos. 12, 13, 14, and 15. A claim for five hundred dollars was filed by him on the 5th of October, 1831, after the sheriff's sale, and, of course, more than six months after the work was performed. It appeared from the evidence that he had been paid seventy-nine dollars on account, leaving due to him a balance of three hundred and fifty-two dollars and sixty cents, which divided among the four houses would give to each the sum of eighty-eight dollars and fifteen cents; but as Nos. 13, 14, and 15 were commenced more than two years before the sheriff's sale, the auditor reported that he was entitled to receive from this fund, only the proportion of eighty-eight dollars and fifteen cents, arising from the house, No. 12.

C. & J. Remington claimed the sum of one hundred and ninety-seven dollars and ten cents, for lumber furnished for
[*299] seven of the *houses, viz., 2, 3, 4, 9, 10, 12, and 13. The last entry in their books was dated September 25, 1829. Their claim, which was filed separately against the seven houses, was entered on the 12th of March, 1830, consequently, within the six months. The auditor reported, that the sum of one hundred and ninety-seven dollars and ten cents was due to them, to be paid, *pro rata*, out of the seven houses stated.

A schedule annexed to the report, showed the amount which

each house ought to pay towards the respective claims. From the statement of the auditor, a balance appeared of the proceeds of Nos. 13, 14, and 15, after satisfying the claims of the mechanics and material men, amounting to three hundred and fifty-five dollars and ninety-three cents, which was appropriated to the judgment creditors.

Exceptions were filed by Samson and Witman's assignee, judgment creditors of Myers, because the auditor allowed the claims of the mechanics and material men, inasmuch as the work done and materials furnished, were done and furnished for the whole of the houses, or a portion of them, more than one, indiscriminately and generally, and not upon the credit of each house separately.

Thomas excepted, because his claim on houses, Nos. 13, 14, and 15, was refused on the ground that the buildings were not sold within two years from the commencement of the building, taking the original commencement, and not the resumption after the new contract of Myers. The commissioners of Kensington excepted to the refusal of the claim for paving.

The lien creditors excepted, and filed the following exceptions:

First. The auditor erred in determining that the eighteen houses or any of them, upon which the money in court has been made by the sheriff, were not sold within two years from their commencement.

Second. The auditor erred in rejecting the claims of several of the lien creditors, upon the ground, that no sale had taken place within two years from the commencement.

Third. The auditor erred in determining that there was but one commencement of all or any of said houses.

Fourth. The auditor erred in dividing the property sold, into lots or parcels. The whole being seized and sold as one, being incapable of division without prejudice to the lien creditors.

Fifth. The auditor erred in allowing the whole of the fund arising from one portion of his division, to the judgment creditors, to the exclusion of the lien creditors.

Sixth. The auditor erred in allowing any portion of the fund in court to the judgment creditors.

Seventh. The auditor erred in fact and law.

Thorn and *Remington* excepted to the report, that the auditor [*300] *erred in allowing any portion of the fund to the judgment creditors; in allowing three hundred and fifty-five dollars and ninety-three cents to the judgment creditors, and in not allowing C. & J. Remington an apportionment on seven houses, instead of six.

Jack, for the lien creditors, contended, that the houses were all sold within two years from the commencement of the building. The date of the new contract with Mrs. Penn's agent must be considered as a new commencement, the prior contract having been relinquished. If a principal part of a building be torn down and rebuilt, it is to be considered as creating a new lien. The Case of the Olympic Theatre, 2 P. A. Browne's Rep. 284. The position now assumed is fully sustained by the cases of the Ins. Co. *v.* Pringle, 2 Serg. & Rawle, 138, and Hern *v.* Hopkins, 13 Serg. & Rawle, 269. Each case must stand upon its own circumstances, and the equity of this case is strongly in favour of the lien creditors.

The apportionment of the lot made by the auditor is in the highest degree unjust to the lien creditors. The lot subject to the ground rent had no value independent of the eighteen houses. The ground formed no constituent part of the proceeds of the sheriff's sale independently of the buildings. Only the right, title, and interest of Myers were sold by the sheriff, and Myers before that time had drawn orders for, and disposed of all his right in the remaining ground except about fifty feet on Perry street. The purchaser did not buy the legal estate. He bought only the equitable estate, and was to have the legal estate on completing the contract. Auwerther *v.* Mathiot, 9 Serg. & Rawle, 397, decides that the purchaser buys only such title as the defendant had at the time. Here only the right, title, and interest of Myers were sold—and when a judgment creditor sells in this way, he shall not be

permitted to come in and say that the property is capable of division, particularly when he becomes the purchaser. The cases of apportionment sanctioned by the court have uniformly been for the benefit of the lien creditors, as in the case of the Olympic Theatre before referred to, and Werth *v.* Werth, 2 Rawle, 151.

As to joint liens the mechanic has a lien on all and every building on the credit of which the work is done. This lien may be perpetuated by filing a claim or bringing an action within the period prescribed by the act of assembly. Take the case of an action. It surely could not be necessary for the mechanic to bring eighteen separate suits for the debt, and the court would consolidate them if so brought. Under his judgment he may issue execution and levy on the whole and sell the whole for the debt. It certainly could not have been intended that the remedy by action, should be more extensive or efficacious than that on the claim filed.

Wheeler, for George Thorn.—Joint liens are good. The act under which we claim is that of 17th March, 1806, and its supplement passed 28th March, 1808. The act applies only to the city and *county of Philadelphia; subsequent acts have extended it. But wherever extended, it has an aspect, [*301] especially to towns and villages, where rows of houses were liable to be raised: the words "house or other building," &c., only are used: nothing is said about land. Browne *v.* Smith, 2 P. A. Browne's Rep. 229, note, is the first decision known of a lien carrying even a city lot? The act received something like a supplement by the decision, Werth *v.* Werth, 2 Rawle, 151, where the auditor ascertained by his own judgment the proper amount of land to accompany a barn.

From the situation of things at the time of passing the law. Owners of ground had got to building largely: they often became bankrupt, to the injury of mechanics and material men. This was denounced. A prior act, viz., one passed in 1803, entitled "an act securing to mechanics and others payment for their labour and materials, in erecting any house or other building, within the city of Philadelphia, the district of

Southwark, and the township of the Northern Liberties," was intended to meet the evil; but was found deficient. It was found that owners, by putting forward architects, could evade the law. Steinmetz *v.* Boudinot, 3 Serg. & Rawle, 541. The act of 1806 declared liability whether the owner showed himself or not. In the period from 1800 to 1806, labour and materials were asked for on a wholesale scale, and were had. These laws emanated from Philadelphia, where evils prompting to them were seen and felt.

The provisions were intended to be ample. The mechanics or material men need not inquire who is the owner of the lot, or what may be his interest in it. Savoy *v.* Jones, 2 Rawle, 343, —need not trouble himself about the inquiry whether the lumber goes into the building or not, if he honestly furnished for the building. Hinchman *v.* Graham, 2 Serg. & Rawle, 170. They have their lien from the commencement of the building. In the Am. Fire Insurance Company *v.* Pringle, 2 Serg. & Rawle, 138, the owner paid as he went, and when he had got his house partly finished, he sold, taking a mortgage. The purchaser went on and finished, and in finishing, he left debts unpaid. The material man filed a lien; and the court decided that as the lien takes its station from the commencement of the building, the mortgage should be postponed. The claimant need not be of any employment or trade enumerated. Savoy *v.* Jones, 2 Rawle, 243.

The act of 1806 provided no specific remedy for the sale of the property affected by the lien. The legislature may have thought that if a lien should merely be attached, it would work a remedy for itself.

The practical construction was in favour of joint liens. By examination of the records of the Common Pleas of Philadelphia, it appears that the number of houses intended to be affected by joint liens, is as great as the number intended to be affected by separate liens. The records more particularly examined have been those between 1803 and 1806. The case in 2 Browne, 229,

[*302] and Knorr *v.* *Elliott, 5 Serg. & Rawle, 49, were both litigated cases, and cases of joint liens; but no exception was taken on that account.

[Pennock *v.* Hoover and Myers.]

From the phraseology of the act. Plural words are used in the act of 1806 and its supplement of 1808. The legislature begin with a plural word, and drop the plural only when awkward, and then resort to it as soon as they can without awkwardness. The greater part of the act of 1806 is employed with checks and provisos; and the whole of the second section of the second act is employed about the remedy, yet there is no restriction against joint liens.

A lien must have its foundation in a contract. If the contract is for materials for six houses, how can separate liens be maintained? If a lien has its foundation in a contract, then what is to prevent an owner of ground from making such a contract as may involve the liability of his land? Gorgas *v.* Douglass, 6 Serg. & Rawle, 512, does not decide this case. The construction we ask for is on different facts. There is the case of fixtures, admitting of different constructions upon the same lease, as between landlord and lessee, and heir and executor. On the same expressions in a will, in favour of a child, interest will be allowed for maintenance, and disallowed to a stranger. Fearne on Contingent Remainders, 477; different construction on the same words, as to real and personal estate. As to the argument against joint liens from inconvenience, it is not known that those for whose benefit the law was made, complained. One of several houses can be freed by a release, as is daily done in relation to judgments and mortgages. As to the objection of different commencements of a joint lien, by reason of the houses having different dates of beginning, there is the familiar case of a mortgage covering land in different counties; which binds according to the different dates of recording.

As to that part of the auditor's report which throws off a part of the fund set aside for the lien creditors, and gives it to the judgment creditors, there is clearly error. The act prescribes liability for debts, &c. The liability of houses is like the liability of partners; each to the full extent of the debt, or like a judgment against several houses, entitled to full payment out of any one.

[Pennock *v.* Hoover and Myers.]

Miles, for the judgment creditors, argued against the joint liens. The act of 17th of March, 1806, securing to mechanics, &c., is an innovation, and must be construed strictly. A latitude of construction will work great mischief to third persons. The ordinary rules for the construction of statutes should decide this point. We gather the intentions of the legislature, first, from the words of the act, which confine the lien to "every dwelling-house"—"other building"—"the building"—pursuing throughout as to the object of the lien, language indicating a single building. The spirit of the act renders the subject more clear. It was to make each individual house responsible for its own workmanship and materials. This prin-
[*303] ciple was settled in *Gorgas *v.* Douglass, 6 Serg. & Rawle, 512; although the case there was of several houses owned by different persons; yet the houses were built together, and the materials furnished indiscriminately to all, and this is confirmed by Savoy *v.* Jones, 2 Rawle, 343, where the Chief Justice speaks of "credit to the building." But the safest guide for construction is to look at the mischief, as it existed at the passing of the act, and the remedy intended to be provided; from thence will be perceived the injurious consequences, which would flow from a construction opposite to that contended for. The reasoning in Gorgas *v.* Douglass, applies with full force to this case. The lien is created by the act of furnishing on the credit of the building, not by the mere filing a claim of record. Hinchman *v.* Graham, 2 Serg. & Rawle, 170. Now in Gorgas *v.* Douglass, the Chief Justice said, that the argument, as to the inconvenience to the material man of keeping a separate account was futile, because he was bound to make inquiry and understand the nature of the credit. So the object of the act was to benefit mechanics who built houses for sale, by giving such a lien only as would not "obstruct the sale;" Ib. Now the builder cannot sell one out of twenty houses, where the one is burdened with the debts of the whole, and the lien being joint, the material man cannot facilitate the sale, by relieving the one house; for a release of a part, is a release of the whole; the lien cannot be severed, without the agreement of all parties interested, which

is impracticable. Again, the court said in Gorgas *v.* Douglass, that a joint lien would be injurious, "because it would not be known what proportion each house was to bear;" and this objection is a serious one, when as is frequently the case, many houses of different sizes, value, cost, and qualities of workmanship, are run up together. The construction we contend for, therefore, can be of injury to no one, if the law be so settled, while on the other hand, great mischief will ensue. It is a settled rule, that statutes shall be so construed as that all their parts shall be consistent if possible, consonant to equity, and least inconvenient. Vaughan, 38, 285; Kerlin's Lessee *v.* Bull, 1 Dall. 178

Stroud, for Pennock and Boyd & Dehaven.

Under the laws which have been enacted for securing to mechanics and others, payment for their labour and materials, there cannot be a joint lien. In Gorgas *v.* Douglass, 6 Serg. & Rawle, 512–21, it was held that a joint claim for materials, could not be filed against several houses owned by different persons, although the houses adjoined each other, were built at the same time, and by the same contractor, who was owner of one, and agent for the owners of the others. Two cases precisely similar to the present, afterwards arose in the District Court for the city and county of Philadelphia, where joint liens were filed against contiguous houses, belonging to the same persons; and the liens were declared invalid. See Atkinson *v.* Graves, Whart. Dig. 548, C. no. 37.

*The question depends on the construction of the act of 17th March, 1806. If we regard the letter of [*304] the act, a lien is given against each building for the labour and materials expended in its construction. The section begins with "all and every house or building" in the singular; and the same words are repeated four or five times in the section. In reference to this feature of the act, the late Chief Justice in Gorgas *v.* Douglass, uses this language. "When it is said that 'all and every dwelling-house,' &c., it would seem that each house was to be 'subject to the payment of its own debts;'" and again, "the expressions of this act are so far from being in

favour of a joint lien, that they must be twisted and tortured to make them bear the appearance of it."

But if we regard the spirit of the act, its obvious scope and purpose, we shall find yet greater reason to confine the lien to the particular house, in the erection of which the labour and materials were expended.

What is the foundation, in point of principle, of the enactment? Is it not, that every building, being supposed to be fully worth what it cost to erect it; and the lot on which it is erected, enhanced in value in exact proportion to the expenditure bestowed on the building; it is reasonable and just, to give a preference of payment out of the property, to those who have so enhanced it. But the doctrine of joint liens, is entirely destructive of this equitable principle.

One house may be much larger, and cost proportionably more than the other, or from a variety of circumstances, such, for instance, as its peculiar situation, one lot may be much more valuable than the other. If a lien can be acquired for labour, or materials expended indiscriminately on all, without reference to the actual enhancement of each, the reason of the law is lost sight of, and its symmetry destroyed. If the argument *ab inconvenienti* is entitled to weight, it applies with great force in the case of joint liens. It is every day's occurrence, that from over-estimates of the architect, and a variety of causes, the builder is disappointed in the cost of his building. When this is the case, and several houses are erected at an expense, perhaps more than double what was considered a safe and liberal calculation, and the mechanics and material men become impatient for their demands; it may be the interest and within the power of the owner, to discharge the liens on one house, and thus place it in the market without incumbrance, and render it available for the relief of the other house. In this way the sacrifice at a sheriff's sale may be averted. But where, as in the present case, the number of houses is greater, the inconvenience of joint liens is more obvious, because infinitely more disastrous. Here the amount of liens may be presumed to be eighteen times the value of each house, supposing all to be of equal size and value. A sheriff's sale is

the inevitable consequence, if the builder have not the means of defraying the entire cost of the whole.

*But the owner is not the only person who suffers from the joint lien. Judgment creditors and mortgagees are subjected to the same hardship; the same necessity of loss by the known depreciation attendant on a sheriff's sale. [*305]

There is yet another consideration arising from the provisions of the act, which would seem to put the question of construction at rest. The date of the liens relate to the commencement of the building, and by express enactment take precedence of any other lien, originating subsequent to that period.

Now on the doctrine of joint liens, however great may be the number of the houses, there can be but one commencement. Suppose the owner of a square of ground should design to cover it with a row of houses, and commence with excavating the cellar of a house at one extremity of the square. Would a person loaning money on a mortgage, on a lot at the other end of the square, incur the hazard of a preference by the lien creditors? Yet to this extent, the advocates of the joint lien are carried. We had contracted, say they, to furnish materials for the row. The buildings were, therefore, commenced before you obtained your mortgage. It is obvious that such reasoning, though fairly deducible from the doctrine of joint liens, when carried to its full extent, is utterly incompatible with the security requisite for the ordinary transactions of business. No degree of vigilance could protect any one from being entrapped. No public record is made of the time when a building is begun. The only evidence is a visible demonstration on the premises. Hence, it is the practice to go to the property, and see if any building is there erected, before a mortgage is taken. This, however, is no protection, if joint liens are tolerated. Can it be supposed then, that the legislature ever meant the law to be so construed? Again, the act provides that the debt shall not remain a lien longer than two years, from the commencement of the building, unless, &c. Now it may be asked whether the lien on the last of a series of houses, terminates in two years

from the time the first was begun. If the lien be joint, the answer must be in the affirmative. Yet it is easy to perceive how disastrous in its consequences such a doctrine would be, to the very individuals it was intended to benefit. In short, joint liens are in no case convenient to the mechanic. The material man alone desires them, and he not for his protection, but for his ease to lessen his labour, but not to secure his rights. In addition, it may be said, that the provision of the act in relation to the entry of satisfaction, at the instance of any person interested in the building, on payment of the costs of office, &c., evidently confines the lien to one building; the costs are of one claim, one action.

The opinion of the court was delivered by

KENNEDY, J.—In this case, the sheriff after having sold the real estate of the defendant, consisting of a parcel of ground and eighteen *unfinished houses, under a writ of *venditioni exponas*, issued at the suit of the plaintiff, brought the money arising therefrom, at the return of the writ into court. Upon this being done, an application was made to have the money distributed among the creditors, whose claims were liens upon the property at the time of the sale, according to their respective dates of priority. For the purpose of facilitating this object, an auditor was appointed by the court, to examine into and ascertain the nature, amount, and date of each of the respective liens, who accordingly made a report. To this report a number of exceptions have been filed, involving questions of some difficulty as well as importance.

[*306]

The claims made upon the fund in court consist of ground-rents, taxes, corporation assessments, judgments, and debts due to material men, lumber men, and mechanics respectively, for materials furnished, and labour performed in the construction of eighteen houses, or some part of the number, at least, all of which were designed for dwelling-houses.

The first question presented by the exceptions to the report is, whether the auditor be right as to the time, when the building of the houses, Nos. 1, 2, 3, 13, 14, and 15 were commenced; or, perhaps, more properly what is meant by the terms "com-

mencement of the building," as used in the proviso to the first section of the act of assembly of the 17th of March, 1806, entitled, "an act, securing to mechanics and others, payment for their labour and materials, in erecting any house or other building within the city and county of Philadelphia," which declares "that no such debt for work or materials shall remain a lien on the said houses or other buildings, longer than two years from the commencement of the building thereof, unless an action for the recovery of the same be instituted, or the claim filed within six months after performing the work, or furnishing the materials, in the office of the prothonotary of the county," &c.

On this question we think the auditor is correct, and that his opinion is fully sustained by the construction given to this act, and the doctrine laid down by this court in the American Fire Insurance Company *v.* Pringle, 2 Serg. & Rawle, 138, and afterwards in Hern & Co. *v.* Hopkins, 13 Serg. & Rawle, 269. The houses in the case before us were from the beginning of the work on them to the end of it, intended for dwelling-houses, and with that view, the building of them was commenced in the spring of 1829, by different persons, who expected to be the owners of them, and as such began the work, under contracts made with Warnet Myers, for the purchase of the ground upon which they respectively commenced the building of them. Warnet Myers, however, not being the legal owner of the ground himself, but having the possession of it merely under an agreement with the legal proprietor for the purchase thereof, and failing to comply with his agreement, never did become the legal *owner of it. On the 16th of June, 1829. [*307] having become insolvent, he made an assignment of all his estate and effects to trustees; who on the 15th of August following, surrendered all right which Myers had under his contract, for the purchase of this ground, to the legal owner thereof. About the beginning of June, 1829, those persons who had previously commenced the building of six houses, Nos. 1, 2, 3, 13, 14, and 15, under their respective contracts with Myers, for the purchase of the ground, quit working at them, and abandoned them, after having dug out

and walled up the cellars. On the same day that Myers's trustees surrendered the first contract, which he had made for the purchase of the ground, he by Samuel Hoover, who acted in trust for him, made a second contract, upon the same terms as the first, with the legal owner for the purchase of it. Immediately after this, Myers procured materials, employed mechanics, and with them resumed the work of building the six houses, making some slight alteration in the foundation of them, but still intending them for dwelling-houses, according to the original design, and at the same time commenced the building of twelve others, the residue of the eighteen houses already mentioned. By the terms of the act of assembly before in part recited, the liens thereby given to mechanics and material men, are made to commence expressly from the commencement of the building of the houses, without reference or regard to the person or persons under whose direction or ownership of the property they are begun, continuing to be the same, at whose instance the materials from time to time, shall be furnished and the labour performed throughout the subsequent stages of the work, until finished. It is not the commencement of the right of ownership or claim to the property, nor yet the time at which such right may be first exercised, in contracting for materials, and with mechanics, for the purpose of continuing the building, that is to fix and regulate the commencement of the liens, on behalf of those furnishing materials, and performing the work; nor is it the time of furnishing the materials, or the time of commencing or finishing the work, but the time of commencing the building of the house, that gives date to the lien. Now, in point of fact, as long as the design or use, for which the house is intended, shall continue to be the same, a change of ownership after the building of it has been commenced, does not, and in the very nature of the thing itself, cannot, change the commencement of the building of the house: that must still continue to be the same, notwithstanding the right of property in the ground and the house begun upon it, shall have been changed subsequently, and passed through twenty or more different hands. Neither is it easy to conceive, how a change

made in the plan of the house, after it has been commenced, by enlarging or contracting, or in any other respect changing the plan of it, as long as the original design of its character is retained, can with propriety be said to change or give a new commencement to the building of it. And the act of assembly *of 1806, certainly contains nothing, which in the slightest degree militates against what I think [*308] may be safely considered the universal understanding as to what constitutes the commencement of the building of a house; and that is the first labour done on the ground, which is made the foundation of the building, and to form part of the work suitable and necessary for its construction. Indeed the act seems to require this construction, in order to carry into effect the intention of the legislature, which is the main thing to be attended to in expounding it. That this construction is the most favourable for those who shall furnish materials, and perform work, in the erection of houses, for whose security and advantage, the act was exclusively designed, can admit of no doubt: for, they thereby gain a preference over all other liens, of posterior date to the commencement of the building, although prior to the time of furnishing the materials, or even contracting for them, and of performing the work. The words of the act in relation to this point, are, "all, and every dwelling-house and other building, &c., shall be subject to the payment of the debts contracted for, or by reason of any work done, or materials found and provided, by any brickmaker, bricklayer, stonecutter, mason, lime merchant, carpenter, painter and glazier, ironmonger, blacksmith, plasterer, and lumber merchant, or any other person or persons, employed in furnishing materials for, or in the erecting and constructing such house or building, before any other lien, which originated subsequent to the commencement of the said house, or other building." This preference can only be lost through the neglect of the party, or a determination on his part not to avail himself of it. If he neglect or will not institute an action for the recovery of his claim, or otherwise file the claim itself in the prothonotary's office of the county, within six months after performing the work, or furnishing

the materials, it will cease to exist, according to a provision contained in the act, in two years from the commencement of the building, so that if any loss shall accrue to him, from not having instituted his suit or filed his claim within the six months, as required by the act, he may be said to have occasioned it himself, and the maxim *volenti non fit injuria* will apply.

The next question arising out of the exception, is, can the same debt, contracted for, or by reason of any work done, or materials found, and provided by any brickmaker, bricklayer, stone-cutter, mason, lime merchant, carpenter, painter, or glazier, ironmonger, blacksmith, plasterer, and lumber merchant, or any other person, or persons employed in furnishing materials for, or in the erecting and constructing of two or more dwelling-houses, or other buildings, adjoining to each other, and belonging to the same person, become a lien under the act of assembly already mentioned, and its supplement of the 28th of March, 1808, against all such houses or buildings? This question is left undecided by the case of Gorgas *v.* Douglass, 6 Serg. & Rawle, 512. The court in that case only decided, [*309] *that the act of 1806, did not authorize a joint claim to be filed, against three adjoining houses, belonging to different persons, for materials furnished, for the building of them. Chief Justice Tilghman, who delivered the opinion of the court, says, "we are not to decide on this occasion what would be the law, if one man shall put up several houses, all his own property, at one time. The case is of three houses owned by three persons." And again he repeats, "I give no opinion on the case of several houses owned by one person."

Although in drawing up the act of 1806, grammatical form does not appear to have been strictly attended to, and it may be that the words employed in the beginning of the first section, would rather seem to indicate an intention that each house or building should only be liable for such work as was done in the construction of it, and for such materials as were either specifically furnished for the building of it, or otherwise actually used for that purpose, yet I am inclined to believe that the intention of the legislature when collected from the whole of the

act of 1806, and its supplement of 1808, was, to give the party who furnished materials generally, for the construction of two or more houses belonging to the same owner, without knowing how much of them was intended for each particular house, or who performed labour in the construction of them under one entire contract generally, a joint lien upon all the houses according to the full extent of the contract.

The effect of the opposite construction, which is contended for in this case by the judgment creditors, would be, that whenever a material man makes an entire contract to furnish the same owner with all the materials necessary to construct two or more houses, for a certain sum of money, or at certain rates, or a mechanic agrees for a gross sum of money to do all the work necessary for the construction of them, neither would have a lien upon the houses, or any of them, as a security for the payment of his claim after the materials shall have been found and the work done. For having made an express contract, each party must abide by it; and if the material man or the mechanic in such case, bring a suit within the six months after having furnished the materials or done the work, it is clear, that having made but one contract under which he was to be paid a gross sum of money upon the delivery of the materials or performance of the work, he can only sustain one action in which he can obtain but one judgment, which must be for the whole amount of his claim; or if instead of bringing an action to perpetuate his lien against the houses, he files his claim in the prothonotary's office within the six months, he must still have regard to the terms of his contract, which makes his claim entire and incapable of division. He can therefore file but one claim, which must be for the whole amount of it against all the houses jointly, otherwise his contract would not support or correspond with the claim filed, which would be an insuperable objection to his recovering in a writ of *scire facias* *sued out on it, according to the principle laid down in Gorgas *v.* Douglass, 6 Serg. & Rawle, 521–2. It [*310] necessarily results then in this, that the lien under the acts of 1806 and 1808, must be joint upon all the houses in such case, or otherwise there can be no lien at all. Against such a lien

being created by these acts, it is contended first, that it is contrary to a strict grammatical construction of them. And again, that great inconvenience as well as injury would necessarily arise to the owner of the houses, who might thereby be precluded from selling any one or more of them without he could obtain a sum sufficient to discharge the whole amount of the lien. Whereas, if each house or building is made liable only for the proper expense of its construction, the owner may often have it in his power to sell the whole number consecutively for a much larger sum of money than the amount of the liens upon all; or to sell a part for a sum sufficient to discharge the liens upon all, and to retain the residue; but if he be compelled to wait until he can sell at once as much of the property as will be sufficient to satisfy the aggregate amount of the liens, he may not happen to meet with a purchaser or purchasers at the same time who are willing to buy so largely, and finally he may have it sold for him, or otherwise be compelled to sell it himself at a great sacrifice. Doubtless such inconvenience may occasionally take place; but the owner of ground who wishes to have houses or other buildings put upon it, has it in his power if he chooses to guard against such inconvenience in making his contracts for materials and labour to be employed in the construction of his houses. It is only necessary for him to make a separate contract for the building of each house, or to introduce a clause into a contract for the whole, that each house shall be charged for separately and liable only for the expenses of its construction, and the lien under the act will follow the nature of the contract. But where the owner is induced to avoid this course because he discovers that he can obtain materials and labour for building his houses at much less price by making an entire contract for the whole, than he could by making a contract for each house separately, why shall he not be permitted to judge for himself in this particular and to act accordingly? It is plain that it was not the intention of the legislature to interfere in the least with the exercise of such a right. And although it is possible that a man may in some instances err in judging for himself in such a case, yet in most cases, if not in all, it will be found

more safe to leave it to himself to judge of; because it must always depend upon circumstances best known to himself, whether one contract for the whole or a separate contract for each house will be most likely to promote his interest the best.

The objection that a joint lien is in opposition to the grammatical construction of the act is perhaps not very clear; but even if it were, it ought not to prevail where it would militate against the meaning and intention of the legislature, as collected from the whole *of the act, and against that construction which gives to every word, clause, and [*311] sentence, a pertinent and useful effect, instead of rendering some of them inoperative. It is said, that because the act declares that "every dwelling-house or other building (thus using the singular number) shall be subject to the payment of the debts contracted" for the building of it, the lien created by the act is for the expense of building it alone and not for that of others; and for the same reason the expense of it with that of others cannot become a joint lien against the whole, although it be but one debt growing out of one entire contract made for building all the houses together. This alone perhaps in almost all cases without other words or expressions being used, would be deemed insufficient to denote severalty, and at the same time to exclude plurality. For even in the construction of penal statutes, where the rule is, that they shall be taken strictly, the use of words in the singular or plural number, is sufficient to embrace objects indiscriminately either in the plural or singular number. As if it be enacted, that he who steals a horse shall not have the benefit of clergy; it could not be pretended, that if he at the same time stole more than one horse, his offence would not come within the act. So the burning of a dwelling-house has been always held to come within the provisions of 23 Hen. 8, cap. 1, although the plural "dwelling-houses" are the words used in that statute. 2 Hale, P. C. 365. But the meaning of the legislature is the first and great object to be sought after in expounding their acts; and where the words employed are dubious, the most universal and effectual way of getting at it, is by considering

the reason and spirit of the act, or the cause which moved the legislature to pass it. 1 Bl. Com. 61. Observing this rule, in connection with one or two others, which require the subject-matter and the words of the act throughout to be particularly attended to, we may arrive at a pretty correct conclusion as to what it was that the legislature intended. It is obvious, that the reason of passing the act of 1806 was to secure, as far as practicable, to material men and mechanics, payment for materials furnished and labour performed by them respectively in the construction of dwelling-houses and other buildings, by making the houses and other buildings subject to the payment of the debts thus contracted, and creating the same a lien upon the property until paid. Now it is well known to every one conversant with this subject, and we must take it for granted, that it was known also to the legislature at the time that they passed the act, that material men and mechanics engaged in putting up houses in the city and county of Philadelphia, had long before that been in the habit of making with the owner of the ground a single contract to furnish materials sufficient for the building of several adjoining houses, in consideration of a certain sum of money or certain prices for the materials, according to their nature and the quantity delivered, to be paid for the same, and a like contract [*312] *for doing the work thereof. And it is certainly not unreasonable to suppose that inability to pay occurred at least as often, if not more frequently, in such cases, and to a much greater amount than in cases of contracts for the building of a single house only, and that the remedy provided by the act must have been intended by the legislature to extend to the greater evil as well as the less. If the legislature, knowing that contracts by the same person to deliver materials sufficient for the building of several adjoining houses, belonging to the same owner, or to do the work thereof, were common, had intended to exclude them from the operation of the act in favour of the material men and the mechanics, and that debts arising under such contracts should not become liens upon the houses for which the materials were found, and upon which the labour was performed, is it not reasonable to believe

that they would have employed terms very different from those used? How is it possible with such an intention that they could have directed as they have done, in the close of the second section of the act of 1808, which is in these words, "provided, that no judgment rendered in any *scire facias* shall warrant the issuing an execution, except against the building or buildings upon which the lien existed as aforesaid." Thus showing, by necessary and irresistible implication, that the legislature were of opinion, that under the provisions of the acts of 1806 and 1808, a claim might exist and be filed as a lien upon more buildings than one, upon which a single writ of *scire facias* might be sued out, one judgment only obtained, upon which an execution might be issued against all the buildings upon which the lien existed; but lest it might be thought that an execution could be issued upon such judgment against other buildings than those upon which the lien existed, they thought proper thus expressly to prohibit it. It is said, however, that this provision is contained in a proviso, and therefore ought not to have an influence upon the enacting parts of the acts. But in The Attorney-General *v.* The Governor and Company of Chelsea Water Works, it was held, that where the proviso of an act of parliament was directly repugnant to the purview, the proviso should stand and be a repeal of the purview, as it spoke the last intention of the makers. Fitzgibbon, Rep. 195.

Seeing then that it was a common practice with material men and mechanics, before the passage of the act of 1806, to make one entire contract with the owner of the ground to furnish materials for, and to perform the work of building two or more houses for a certain sum of money, or at fixed rates, and it occasionally happened that their employer after they had furnished the materials and performed the work, was unable to pay them, and his property, during the interim, including the houses they aided him in building, had become incumbered beyond its value, it may be very rationally and fairly inferred that such cases formed at least a part of the mischief that was intended to be remedied by the passage of

[*313] the acts *in question; and being also inclined to think that the words and various expressions of the two acts when viewed and taken all together, embrace and provide for such cases, I am necessarily brought to the conclusion, that the material man who furnishes at the request of the owner, materials for the building of two or more houses generally, without any special contract, or under a contract to furnish whatever may be necessary to complete the whole number at a fixed sum, or according to certain rates, or the mechanic who in like manner, performs work in putting up the houses, acquires a joint lien for the amount of the materials found or the work performed upon all the houses. That such has been the opinion of the most eminent counsel in the state, may be fairly inferred from Knorr *v.* Elliott, 5 Serg. & Rawle, 49, in which Mr. Binney appeared for the plaintiff, and Mr. Chauncey for the defendant. There is no statement of the case given, except what is contained in the opinion of the court, delivered by the late Chief Justice; who says, "the plaintiff obtained a lien on certain houses now belonging to the defendants, for materials furnished by him for the building of the said houses. The plaintiff's claim was filed in the office," &c. The claim and the lien are both spoken of in the singular number, and the houses in the plural; so that it is manifest there was but one claim and one lien, which was admitted to have had an existence at one time upon several houses under the operation of the act of 1806, but was opposed then on the ground that as no *scire facias* had been sued out upon it within five years from the time it was filed in the prothonotary's office, the lien was extinguished by the act of the 4th of April, 1798, which limits the liens of judgments to five years unless revived by *scire facias*.

So I also think, that where the lumber merchant furnishes materials for, or the mechanic does work, in the construction of two or more contiguous houses, belonging to the same person, under a general request, without any specific contract for each house separately, that he may under the acts of assembly, either file his claim for the amount against all the houses jointly, or he may apportion it among them according to the value or

price of the materials furnished or the work done to each, and file his claim accordingly against each house separately, and thus continue his lien in either form.

There being nothing then, as I conceive, in the acts of assembly, which restrains the parties from including in the same contract, materials for, and the work of as many contiguous houses as they please, it would seem to follow that the nature and terms of it, together with the work done under it, ought to regulate the operation and extent of the lien. Hence it would extend itself to all the houses or buildings actually commenced, for which the materials were furnished or work done under the same contract, and would become a joint lien for the whole amount of the debt, commencing on each house with the commencement of the building thereof. *This appears to be not only the most obvious as well as safe [*314] and certain rule or guide, by which the nature and the extent of the liens of material men and mechanics may be determined, but the best suited to give to those persons, that degree of security for the payment of their respective debts, which was intended by the legislature. In its operation and effect, it may be fairly likened to the lien of a mortgage, given to secure the payment of money borrowed, upon a number of different tracts of land, say eighteen in all, lying in as many different counties of the state. The lien under it would commence, and the whole amount of the debt become a charge upon each tract from the date of the recording of the mortgage in the county in which each tract was situated; and as it would scarcely be practicable to have the mortgage recorded in any two of the counties on the same day, the date of its lien on each tract of land would vary accordingly, but as soon as recorded in all the counties, the mortgage debt would become a joint lien upon all the eighteen tracts of land embraced in the mortgage. And if in such case afterwards, while other liens existed on the mortgaged lands, some of prior, some of even, and others of subsequent date to that of the mortgage lien, a judicial sale were to be made of all the lands under a proceeding had upon the mortgage for that purpose, and the moneys arising therefrom prove insufficient to pay off all the liens, the rule for appropri-

ating it in such case according to seniority of lien could not well be misapprehended as it must be familiar to all.

The next question raised by the exceptions to the report of the auditor is, whether under the acts of 1806 and 1808, the ground upon which the houses are built, can be divided and apportioned among them so as to allow to each only such quantity of ground as is usually occupied with, and necessary for the enjoyment of houses in a similar situation of like dimensions, and built upon the same plan? Upon this point I consider the opinion of the auditor correct, and in perfect accordance with what appears to me to be a reasonable interpretation of the acts of assembly. Against his opinion it has been argued, that as the whole of the ground formed the subject of but one purchase, and consisted only of one parcel, without any subsequent actual division being made of it by the purchaser, it was not competent for the auditor to make a division of it, or of the money arising from the sale of it. Now in respect to this, it may be observed, that by a literal construction of the act of 1806, it may be made a question, whether the lien can be extended beyond the ground actually covered by the house or building; because by the words of the act, it is the house or building that is made subject to the payment of the debt, and no mention whatever is made even of the land or ground upon which it stands. It is, therefore, only by a liberal, or perhaps more properly speaking, a reasonable construction, that the lien created under this act can *be made to embrace any [*315] land not covered by the buildings. And although it may be necessary, in order to carry into effect, what seems to have been the intention of the legislature as manifested throughout the act, to extend the lien to land beyond what may be covered by the buildings, yet there must be some reasonable limit in this respect; and here it appears to me that the purpose of the legislature will be fully satisfied by extending the lien beyond the ground covered by the buildings, to as much more as may be necessary for the convenient occupation and enjoyment of them according to the intention and design of the owner at the time of their commencement. This would seem to be giving to the party all the security that was intended

by the act; and anything short of this would, perhaps, in most instances, render it very ineffectual.

In this case the auditor has made a division of the ground, allotting to each house not only what would seem to be as much as is usually occupied as a curtilage to such houses placed in a similar situation of the county or city of Philadelphia, but all that the owner of the houses had intended should be used as appurtenant thereto, according to his plan of improvement as indicated by the work done upon the ground itself. In this I think he was right. The residue of the ground not being necessary to the proper occupation and enjoyment of the houses, remained of consequence unincumbered by the debts contracted in the building of them, but liable to the payment of the judgments which were liens upon it; to which the auditor has very properly appropriated the money arising from the sale thereof.

The next question which requires notice, arises out of the exception taken to the report of the auditor by the counsel for the commissioners of the Kensington district of the Northern Liberties. By the first section of the act of assembly passed the 3d of February, 1824, Purd. Dig. 190, entitled "an act relating to taxes on real estate in the city and county of Philadelphia," it is enacted, that "all taxes, rates, and levies which may thereafter be lawfully imposed or assessed to be applied for any purposes either in the city or county of Philadelphia on real estate situate in the said city and county of Philadelphia shall be, and they are hereby declared to be a lien on the said real etate on which they may thereafter be imposed or assessed, &c.; and the said lien shall have priority to and shall be fully paid and satisfied before any recognizance, mortgage, judgment, debt, obligation, or responsibility, which the said real estate may become charged with or liable to, from and after the passing of that act." And by the eighth section of it, it is further enacted that, "all and singular the provisions of this act shall be deemed and taken to apply to the taxes, rates, and levies imposed or assessed by authority of the city of Philadelphia, or any corporation in the city or county of Philadelphia, upon real estate situate in the said city or county, except water rents, which may be imposed for *the use of the [*316]

Schuylkill water, which shall not be considered as coming within the provisions of this act."

After this, by an act passed on the 19th of March, 1828, Pamph. Laws of 1827–8, pages 190–1, the board of commissioners of Kensington district of the Northern Liberties were empowered to pave all or any part of the footways and gutters within the said district; and upon the application of a majority of the owners of the lots fronting on any street, road, lane, or alley, to pitch and pave any such street, road, lane, or alley within the said district; and to tax the property in front of such footway, street, road, lane, or alley as should be paved, or pitched and paved, in proportion to the extent of the same in front. The commissioners by the third section of this latter act are likewise authorized to recover the taxes assessed for pitching, paving, and curbing in front of property unoccupied, or if occupied without sufficient personal property thereon to satisfy the same, in the same manner as county rates and levies in the county of Philadelphia are or thereafter may be by law recoverable; or to institute actions for the recovery of the said assessments before any tribunal within the state, having jurisdiction of the amount claimed, against the owner, and to recover the same with legal interest from the time of making said assessments. Under this act an assessment amounting to seven hundred and fifty-one dollars and forty-eight cents was made on the 12th of October, 1829, to defray the expenses of paving on Second street below Master street, in front of part of the property from the sale of which the money has been raised in this case. This assessment never having been paid, is claimed out of the moneys arising from the sale of that part of the property in front of which the paving was done. The auditor was of opinion that the assessment did not become a lien under the provisions of the two acts last mentioned upon any part of the property sold, and therefore disallowed it. In this it appears to me he has committed an error. For the act of the 3d of February, 1824, declares expressly, that "all taxes, rates, and levies which may thereafter be lawfully imposed or assessed to be applied to any purposes either in the city or county of Philadelphia shall be a lien on the said real estate

on which they may thereafter be imposed or assessed, &c. And that the said lien shall have priority to, and shall be satisfied before any recognizance, mortgage, debt, obligation, or responsibility which the said real estate may become charged with or liable to from and after the passing of that act." And again, by the eighth section of it all its provisions are made applicable to taxes, rates, and levies imposed or assessed by any corporation within the city or county of Philadelphia. Now the commissioners of Kensington district of the Northern Liberties being a corporation within the county of Philadelphia, and the tax for paving having been lawfully assessed by them, it seems to me that it falls directly within the provisions of this act, and is thereby made a lien upon a *part of the property sold in this case, and must be paid before any other debts to which it was liable. [*317]

It is no objection to this tax being a lien upon the property upon which it was assessed, that the commissioners of the Kensington district were not authorized to impose a tax for such purpose at the time of passing the act of 1824, because that act is prospective in its terms and makes all taxes which shall be thereafter lawfully assessed for any purpose whatsoever by any corporation in the county of Philadelphia upon real estate lying therein a lien on the same. So that it is sufficient under the provisions of this act to make the tax a lien, if the corporation had lawful authority to assess it at the time of doing so, and executed that authority in due form, no matter when it was granted. The act only requires that the tax, when assessed, shall be lawfully assessed in order to make it a lien, and in the case under consideration it is admitted that the tax for paving was lawfully assessed under the act of 1828, recited above, which is sufficient to make it a lien. The acts of 1824 and 1828 are in *pari materia* and to be construed as one act; and certainly there is nothing contained in the act of 1828 which alters or repeals any part of the act of 1824: neither can any good reason be assigned, as I apprehend, for making taxes assessed under an authority which existed at the time of passing the act of 1824 a lien upon the estate whereon they are assessed, that would not apply with

equal force to taxes assessed under an authority granted subsequently.

But it is objected that by an act passed the 20th of March, 1830, Pamph. Laws of 1829–30, page 122, the legislature have declared, "That all real estate within the Kensington district of the Northern Liberties, should be subject to the payment of the debts contracted by the commissioners of the said Kensington district of the Northern Liberties, for or by reason of any work done, or materials furnished, for, or in pitching, curbing, or paving any street or footway in front of said real estate, before any subsequent liens; provided, that nothing therein contained, should in any wise impair or affect such liens as were existing at the time of passing that act;" and that if such taxes had been a lien before, and at the time of passing this last act, it would have been unnecessary. The passage of this last act, however, at most only proves that the legislature at the time, were not aware that all such taxes and assessments as are therein mentioned had been made liens by a previous act: and it cannot be sustained for a moment, that their mistake or misapprehension of the law in this respect, would make it different then from what it really was: or different from what it would have been in case this last act of 1830 had not been passed; for it repeals no part of the prior acts, so far as respects the making of taxes, lawfully assessed, liens upon the real estate whereon they are imposed. It is merely affirmative of them, and in [*318] effect declares that the law *in this behalf shall be the same, that it was before under their operation. The proviso in this last act expressly declares that nothing therein contained shall in any wise impair or affect such liens as were existing at the time of its passage. Seeing then that it is merely an affirming and not a repealing act, the prior acts on the same subject must receive the same construction, as if it never had been passed; and the lien created under them is preserved by the proviso of this lact act. The assessment then of seven hundred and fifty-one dollars and forty-eight cents for paving, with interest thereon from the 12th of October, 1829, being a lien upon a part of the property sold, when the

act of 1830 was passed, and expressly preserved unimpaired by this act, must be paid according to the terms of the act of 1824, before any "recognizance, mortgage, judgment, debt, obligation, or responsibility," to which the property assessed was liable at the time of sale, and is therefore payable out of the money arising from the sale of that portion of the property in front of which the paving was done, and for which the assessment was made, before the debts of the material men, mechanics, or judgment creditors.

The claim of George Thorn requires now to be examined. It was for bricks furnished, and has been allowed by the auditor in his report. The amount thereof is three hundred and ninety-one dollars and fifty-two cents, and appears from the report to have been filed within the six months, against eight of the houses generally, without any description or designation by which it is possible to ascertain which eight of the whole number were intended. Under this uncertainty, the auditor thought it right to charge this claim or the *pro rata* proportion of it, upon each one of all the eighteen houses instead of eight only. This was clearly wrong, because it was charging the claim in part upon at least ten houses against which no claim was ever filed, or alleged to have existed at any time. And from the want of a proper designation of the houses mentioned in the claim filed, it appears to me to be void for uncertainty, and altogether insufficient to continue the original lien, whatever it might have been against any of the houses beyond the two years from the commencement of the buildings. But it is alleged that Mr. Thorn is able to show by proof the houses for which he furnished the bricks, and that the sale of the houses was made within the two years. If he does this, his claim to a proportion of the money will still be good; because that will show that the lien created in his favour by the act was in full force at the time of the sale, and certainly would have continued to be so until the end of the two years, had not the sale been made, without filing his claim in the prothonotary's office. The filing of a defective claim could not destroy the lien which he had at the time, though it would not have been sufficient to have continued it beyond the two years. As this

case is to go back to the auditor, Mr. Thorn will have an opportunity of establishing his claim in the manner suggested; [*319] and if he does so, he will be entitled *to come in for a *pro rata* proportion of it, otherwise it must be disallowed.

The exception to the report of the auditor, on account of his appropriating three hundred and fifty-five dollars and ninety-three cents, the balance of the proceeds of the houses, Nos. 13, 14, and 15, after satisfying their *pro rata* proportion of the liens of the material men and mechanics, according to the principle adopted by him in stating his account, claims our consideration next. The auditor, although of opinion that a claim for materials furnished or work done generally, without any specific contract, towards the building of two or more of the houses was good under the act of 1806, and that the party so furnishing the materials or doing the work, might at his election have either a joint lien against them all by filing his claim in that form, or a separate lien against each building for its due proportion of the materials furnished or work done, by filing his claim against each separately, yet thinking in the case of the claim being filed as a joint one, that each house or building embraced within it, was only chargeable with its aliquot proportion of the whole amount thereof, he has accordingly charged No. 14 or the proceeds thereof, with sixteen dollars and seventy-two cents, being only a small part of one of the claims of Isaac Childs, which was a joint lien upon No. 14, with two or three other of the houses; still leaving a considerable balance of it unpaid, and a surplus of the proceeds of No. 14, which is included in the three hundred and fifty-five dollars and ninety-three cents, and transferred to the payment of the judgments, being liens of a subsequent date. Instead of doing this, it appears to me that the whole of this claim of Childs ought to be paid first out of the proceeds of No. 14, before any part of it shall be appropriated towards payment of the judgments or any other subsequent liens. The general rule is well settled, that liens upon real estate in this state, whether joint or several, must be satisfied out of

the moneys arising from a judicial sale thereof, according to their seniority.

In further explanation of the principle here intended to be laid down, I would observe, that in case of a joint lien, each house or building bound by it, is liable for the whole amount thereof; and where there are other liens of equal date, some joint and others several, as in the present case, all of equal date, the money arising from a judicial sale of all the houses, must be marshalled and appropriated in such manner, that the proceeds of no one of them shall be appropriated to the discharge of any subsequent lien as long as any portion of a prior lien, either joint or several, upon the same house remains unsatisfied.

The auditor in his report shows the claim of C. & J. Remington, amounting to one hundred and ninety-seven dollars and ten cents, to be a joint lien on No. 13, and six other of the houses; but inadvertently, I presume, has omitted in schedule F. to apply any part of the proceeds of No. 13 to the payment of it. This must be corrected *so as to allow to this claim a due proportion of the proceeds of No. 13, according to the principles already laid down. [*320]

It now only remains to notice what I consider an error in the manner of charging and allowing the claim of Isaac Childs. From the report of the auditor, it appears that he had three several claims of eighty dollars and seventy-nine cents each, which were each charged jointly on three of the houses, and a fourth of ninety-nine dollars and fifty cents, charged on four of the houses. Each claim embraced houses different from that of every other, so that no one or more of the same houses were included in any two of the claims. These claims were each reduced something by the auditor, but then he seems to have charged the aggregate of the balance of them as one entire claim jointly, upon the thirteen houses embraced in the four several claims, instead of charging the balance of each claim separately upon the proceeds of those houses specified within it, and against which it was filed. This must also be corrected, or otherwise Childs, upon the principle laid down for adjusting and making distribution of the money

among the several claimants, will receive more than his due proportion.

Excepting so far as error has been herein shown to exist in the report of the auditor, it is considered to be correct, but in order that the account and appropriation of the money may be stated and made according to the principles now laid down by the court, the case is referred back to the same auditor for that purpose.

Cited by Counsel, 2 Wh. 197; 5 Wh. 416; 6 Wh. 188; 8 W. & S. 448; 1 H. 168, 205; 3 H. 267; 8 H. 445; 6 C. 126; 7 C. 70; 9 C. 42; 11 C. 350; 1 Wr. 184; 3 W . 410; 9 S. 403; 14 S. 456; 17 S. 339; 1 N. 364, s. c. 3 W. N. C. 413; 10 N. 210; 12 N. 130; 12 N. 426, s. c. 9 W. N. C. 28; 3 W. N. C. 375; 10 W. N. C. 44; 14 W. N. C. 267.

Cited by the Court, 7 W. & S. 382; 5 Barr, 20; 1 H. 114; 11 C. 132; 8 Wr. 116; 28 S. 121, s. c. 1 W. N. C. 341; 30 S. 294, s. c. 2 W. N. C. 265; 2 N. 121; 4 N. 416, s. c. 5 W. N. C. 43; 3 O. 569; 11 W. N. C. 460.

Commented on and explained in 5 Wh. 305, and approved in 2 J. 48.

In a case where one party dug a cellar, paid up all liens, and sold the property, and his vendees then proceeded with the building, it was held that as there was no identity of parties, estate, or contract, the liens did not relate back to the digging of the cellar, but only to the revival in operations: 28 S. 122, s. c. 1 W. N. C. 341.

Several Acts have been passed with regard to the apportionment of mechanics' liens where work has been done on several houses. See 30 S. 294, s. c. 2 W. N. C. 265.

[*321] *[PHILADELPHIA, APRIL 16, 1835.]

Wildemuth *against* High.*

APPEAL.

On appeal by a defendant from the judgment of a justice, and award by arbitrators for a less sum, the defendant does not under the act of 1810, forfeit his right to recover his costs on the appeal from the plaintiff, by calling a witness after the plaintiff had closed, who had been previously examined by the plaintiff, and could not testify to anything material to the issue, on the part of the defendant.

---

* For the report of this case, the reporter is indebted to Mr. Sterigere.

[Wildemuth *v.* High.]

WRIT of error to the Common Pleas of *Montgomery* county.

This suit in which Catharine High was plaintiff, and Henry Wildemuth the defendant below, was instituted before a justice of the peace, to recover from the defendant a bill for boarding his son, while in the employment of another person, Mr. Sergeant, a druggist. The justice gave judgment against the defendant for fifty-two dollars and fifty cents, from which he appealed to the Court of Common Pleas; and the case was referred under the compulsory arbitration act. The arbitrators reported in favour of the plaintiff, thirty-one dollars and fifty cents, and that each party should pay his own costs. The defendant obtained a rule to show cause, why judgment should not be entered without costs, and the defendant allowed his daily pay, counsel fee, and costs on the appeal. This rule was discharged by the court, and was the error assigned.

The plaintiff gave evidence before the arbitrators, which she had not given before the justice. The defendant produced no evidence before the arbitrators, which had not been before the justice. On the trial before the arbitrators John High, the plaintiff's son, who had not been examined before the justice, was produced by the plaintiff. After he had been examined, and had withdrawn to another part of the room, the defendant told him not to depart, as he wished to examine him further. He was afterwards called by the defendant, immediately after the plaintiff had closed, and he testified as follows:—"Mr. Sergeant lived at the corner of Fourth and Wood street, about two squares from my mother's, where he kept a drug store, and Jesse Wildemuth was with him. Jesse brought him to our house. I don't know that he moved from Philadelphia to Baltimore. I am generally away till after sundown."

The production of this testimony, it was alleged, exonerated the plaintiff from the payment of the defendant's costs on the appeal.

Sterigere, for the plaintiff in error.

*1. Costs are exclusively a matter of statutory regulation. 1 Penn. R. 461; Ashmead, 3. Neither justices, [*322] arbitrators, juries, nor courts, can give to, or deprive a party

of costs, when the law prohibits or allows them. 2 Binn. 590; 4 Binn. 16; 1 Serg. & Rawle, 417; 2 Serg. & Rawle, 530; 10 Serg. & Rawle, 193; 15 Serg. & Rawle, 133. On the reversal or abatement of the judgment of a justice, on appeal, the plaintiff is not entitled to costs, act 1810, sec. 4, Purdon, 496; 13 Serg. & Rawle, 198; 1 Watts' Rep. 129. Here the award being less than the judgment of the justice, the plaintiff is not entitled to costs.

2. The award being less than the judgment, and the defendant having given no new evidence before the arbitrators, which deprived him of costs, he is entitled to recover his costs on the appeal, from the plaintiff. The act of 1810, sec. 4, gives the defendant his costs on appeal, if he succeeds in reducing the judgment of the justice; if he produces no other evidence, than that which he exhibited before the justice. The condition is annexed to prevent him from holding back his evidence, before the justice. 1 Browne, 206; 16 Serg. & Rawle, 168. No small or accidental variance of proof, will discharge the appellee from costs. The general rule is, that if the appellant produces new evidence to strengthen his case, he loses his right to costs. 16 Serg. & Rawle, 168. If he called a witness who could testify to nothing, he would not lose his costs; for the same reason if the witness could not testify to anything pertinent to the case, it would not affect his costs. In this case, the new evidence was in substance the mere cross-examination of one of the plaintiff's witnesses. What the witness stated, had no relation, or application to the issue. It did not vary the evidence. It does not deserve the character of the "evidence," or "proof" in the cause. It did not in the slightest degree strengthen the defendant's case. The court should, therefore, have made the rule absolute. 2 Rawle, 149.

Hirst, for the defendant in error.

Judgment reversed as to the costs, and affirmed as to the residue; and judgment that the defendant below recover his costs on the appeal

Cited by Counsel, 1 N. 66, s. c. 2 W. N. C. 669.

*[PHILADELPHIA, APRIL 16, 1835.] [*323]

In the Matter of Harland's Accounts.

APPEAL.

The report of an auditor adjudicating upon facts, ought not to be set aside, except for plain mistake, which it is the business of the exceptant to establish by affirmative evidence where it is not self-evident in the report.

A commission of rather less than five per cent., allowed a guardian, the estate being large and attended with responsibility and labour.

A father who is of ability to support and educate his child, is not entitled to charge for his maintenance and education, and the expenses of his voyage abroad.

There is no rule in Pennsylvania that compound interest may not be charged in case of corruption.

But where the estate has been managed with fidelity and no unnecessary delay in investing, the guardian is chargeable only with the interest actually made on sums invested, computed from the date of each investment; and with simple interest on the uninvested sums retained in his hands, computed from the receipt of each.

THIS case arose upon an appeal from a decree of the Orphans' Court of the city and county of *Philadelphia*, made without argument, confirming the report of the auditors in the matter of the accounts of John Harland, Jr., guardian of Charles D. Harland.

John Harland, Jr., began to act as guardian of the estate of his son, Charles D. Harland, on the 21st day of December, 1807. Charles D. Harland became of age on the 26th day of March, 1828, and on the 31st of the same month assigned all his estate to James Schott and Charles Roberts in trust for certain purposes. On the 18th of July, 1828, John Harland, Jr., filed his accounts as guardian, which were referred to auditors: and at the request of the parties the accounts were extended to the 31st of March, 1828, when the estate passed to the trustees.

The auditors stated two accounts, a general guardianship account and an interest account. The general guardianship account debited the guardian with the amounts of money actually received, and the amounts of interest receivable by

[In the matter of Harland's accounts.]

him from investments made by him, and credited him with commissions at two and a half per cent. and with his expenditures in the management of the estate.

Into this account passed the balance of an interest account. It included two schedules. Schedule No 1 was a series of accounts; the first relating to the affairs of the first year of the guardianship; the others severally relating to the transactions of each succeeding period of six months. The Dr. side of each of these accounts showed the amount of moneys actually received by the guardian within the particular period, and the amount of interest receivable by him within the same period [*324] from the investments which he had *made. The Cr. side exhibited first, an allowance to him for commissions of two and a half per cent. on the amount of debits, and secondly, such amounts as it appeared by the evidence before the auditors, that he had expended in the management of the estate. The balance of each of these accounts was carried to schedule No. 2. In schedule No. 2, interest at six per cent. was charged for and against the guardian, on the several balances ascertained by the accounts in schedule No. 1, to have been due to, or from him, at the periods when those accounts respectively close. The interest was calculated from those periods to the 31st day of March, 1828:—and the balance of the interest account, so framed, passed into the general guardianship account.

The effect of thus stating the interest account is, that the guardian is allowed an average time of three months, in which to collect the interest moneys due the estate, and to make investment of them,—that his commissions are set off to him at the times when the moneys came into his hands,—that as to investments made by him, he is credited with the amounts actually invested, as if they had been made to produce six per cent.—and that he is debited with interest at that rate, only on the amounts, less his commissions, which, at the expiration of the average time of three months, he had omitted to invest at all. This charge of interest appeared the more reasonable to the auditors, as it was not shown that the moneys of the ward's estate were kept by the guardian distinct and separate from

[In the matter of Harland's accounts.]

his own. The estate of the ward, moreover, being altogether in money, no reservation by the guardian was thought necessary for contingent expenses.

The testimony of real estate brokers was adduced by the trustees for the purpose of showing that several mortgages, investments of the ward's money, were purchased by the guardian at a discount, while in his accounts he had credited himself with the whole amount of the principal with interest from the day of purchase.

Joseph Gibbons testified, that he had once sold Mr. Harland a mortgage assigned by J. B. Wallace for five thousand dollars, many years ago, to the best of his recollection at a discount of sixty dollars.

Isaac Elliott testified, that he had had one transaction of putting out money for Mr. Harland in 1817. He purchased a mortgage from Mr. Andrews and the witness, of one thousand three hundred dollars, the mortgagee was Knecht, 1833–34. There was a deduction from the amount. He paid less than par—could not say how much—not less than ten per cent. It was a time when money was scarce. It was a bonus given for the money. There were extensive transactions at that time in assignments of mortgages, in which large discounts were allowed. Witness had known ten per cent. frequently given. It was almost impossible to do business at that *time [*325] in any other way. He never could do anything with Harland at less than ten per cent. Witness made a number of efforts to do business with Harland, but could not succeed except on that occasion. He was particular as to the securities, and the discount was frequently an objection.

The auditors credited the guardian in all cases of old mortgages with the principal and interest calculated to the day of purchase without allowing any discount, except in the cases of Wallace's and Knecht's mortgages.

The testimony of several real estate and stock brokers was adduced by the guardian, for the purpose of showing the pains taken by him to loan the ward's money, and that he had obtained the best interest that could be procured.

The auditors disallowed a claim made by the guardian, for

the support, maintenance, and education of his son, on the ground that he being confessedly of full ability to support and educate him in a proper manner, he was bound to do so without drawing the means from the ward's fortune; and on the same principle they disallowed a claim for moneys advanced for the expenses of a voyage by the ward to England.

The following exceptions were taken by the trustees of Charles D. Harland, to the report of the auditors:

First exception.—To the amount of the semi-annual balances reported by said auditors,

For that, first, the said guardian is credited with the whole amount for which the mortgages purchased by him, appeared to have been given, although it was in evidence that such securities were for a long time at a considerable discount.

Second, the interest on said mortgages accruing between the last day of payment, and the time they were purchased by him, has been credited to the guardian without proof that he had actually paid it.

Second exception.—To the interest account as stated by the auditors aforesaid.

For that no rests have been allowed during a period of twenty years, although no investments were made by the guardian under the direction of this court, nor were the accounts of the minor kept separate and distinct from those of the guardian, the securities being taken in his own name generally.

Third exception.—To the allowance of commissions as made by the auditors.

For that, first, the guardian is not entitled to claim any commissions, as he has not managed and discharged the trust confided to him according to law.

Second, the rate of percentage is too high, and charged upon too large a sum.

[*326] *Third, the sum allowed is more than a just compensation for the care and trouble of the guardian in the management of the said minor's estate.

The report was also excepted to by the guardian, for the following reasons:

[In the matter of Harland's accounts.]

First. That the auditors have not admitted, but have disallowed the charges made by the guardian for the support, maintenance, and education of the ward, and also, for debts paid for him, and also for his traveling expenses.

Second. That the auditors have allowed to the guardian a commission wholly inadequate to his care and trouble; that is to say, a commission of two and a half per cent. on the amount of the debits in the account B. schedule, No. 1, when he should have been allowed a commission of five per cent. on the amount of moneys received by him.

Third. That the auditors have charged the guardian interest when no interest ought to have been charged to him, and at a higher rate than was obtained, or could have been obtained for the money of the ward upon any safe investment.

Fourth. That the auditors have adopted a rule in making the charge of interest against the guardian, not authorized by law, nor justified by the facts of the case, inasmuch as it was proved to the auditors, that the guardian kept the moneys of the ward separate and distinct from his own, and used all due diligence to keep them invested; and they have charged him interest on all the moneys of the ward, which were collected or received, or which ought to have been collected or received, allowing an average of three months, to make investments; instead of charging him with the interest actually received by him and credited to the ward.

The report having been confirmed by the court, an appeal was taken, and it was argued at great length by

Williams and *Meredith*, for the trustees; and by
Chauncey and *Sergeant*, for the guardian.

For the trustees, it was contended,

1st. That the report of the auditors was erroneous, in crediting the guardian with the whole amount of the principal of mortgages, with interest calculated to the day of purchase; and that in no instance had a mortgage been credited to the ward at a discount. In the case of Knecht's and Wallace's mortgages, it had been proved that they were purchased at a discount; yet

the ward was charged by the guardian with the whole amount of principal and interest. They contended that under these circumstances, the burthen of proof lay on the guardian, to show what he had paid for all the mortgages.

2d. They contended that the mode of charging interest against the guardian was just, and by no means too severe. [*327] This was the *case of a guardian who, as the auditor had reported, had not kept separate accounts; and had mingled his own with his ward's money. Baker *v.* Richards, 8 Serg. & Rawle, 15; Pim *v.* Downing, 11 Serg. & Rawle, 66; who had not collected regularly; Barron *v.* Rhinelander, 3 Johns. C. C. 615; nor invested regularly. The rule is that unless the guardian proves that he could not invest and keep separate and distinct accounts, he is to be charged with interest. Fox *v.* Wilcox, 1 Binn. 194; Findlay *v.* Smith, 7 Serg. & Rawle, 264; Flintham's Appeal, 11 Serg. & Rawle, 16; Com. *v.* Mateer, 16 Ib. 420.

This is a fair case for charging the guardian with interest. Then by what rule?

The auditors have adopted the rule established in merchants' accounts.

The aggregate receipts for six months are carried forward, and so also the aggregate investment, and the balance is the sum on which interest is charged. It is the same in principle, as if each receipt and each investment had borne simple interest from its date. However proper this may be, in the case of merchants' accounts, where there is a right to draw at any moment, and where there are mutual accounts, and frequent settlements, the reason does not hold with accounts of the guardian, in whose hands the money remains for years. Nothing less than compound interest will indemnify the ward. It is in the power of a mortgagee, or other creditor, to compound by getting judgment for the debt and interest; and ought a ward who is not *sui juris*, to be in a worse situation? The act of assembly requires a guardian to account every three years. If he had done his duty in so accounting, there would have been triennial rests. Certainly he cannot take advantage of his own neglect of duty. They further cited,

[In the matter of Harland's accounts.]

Say *v.* Barnes, 4 Serg. & Rawle, 112; Baker *v.* Richards, 8 Ib. 16; Pim *v.* Downing, 11 Serg. & Rawle, 66; Johnson's Appeal, 12 Ib. 324; Bonsall's Appeal, 1 Rawle, 266; English *v.* Harvey, 2 Ib. 305; Clarkson *v.* Depeyster, Hopkins. C. R. 424; Dunscomb *v.* Dunscomb, 1 Johns. C. C. 508; Merrick's Appeal, Ashmead's Rep. 305; Schieffelin *v.* Stewart, 1 John. C. R. 620.

3d. On the point of commissions, they cited Pusey *v.* Clemson, 9 Serg. & Rawle, 209; Walker's Estate, Ib. 223.

4th. The charges made by the guardian for the support, maintenance, and education of the ward, cannot be admitted, the guardian being of sufficient ability. On this head they cited Hughes *v.* Hughes, 1 Bro. C. C. 387; Jackson *v.* Jackson, 1 Atk. 513; Butler *v.* Butler, 3 Ib. 60; Faulkner *v.* Watts, 1 Ib. 408; Darley *v.* Darley, 3 Ib. 399; Roach *v.* Garvan, 1 Ves. 160; Andres *v.* Partington, 1 Bro. C. C. 60; 2 Roper on Leg. 217; 1 Mad. Ch. 142; Jeffries *v.* Jeffries, 3 Atk. 122; Walker *v.* Shaw, 15 Ves. 122; Mundy *v.* Hood, 4 B. C C. 224; Heyward *v.* Cuthbert, 4 Dessauss. 445; Cruger *v.* Haywood, 2 Ib. 110; Dane *v.* Howard, 4 Mass. 97; Billingsley *v.* Cucket, 1 Bro. C. *C. 268; Miles *v.* Wister, 5 Binn. 477; Palsford *v.* Hunter, 3 Bro. C. C. 416. [*328] Reeves Dom. Rel. 324.

For the guardian it was argued,

1st. That the charges for support, travelling expenses, &c., ought to have been allowed. The general rule of law, as stated by the counsel on the other side, is not to be controverted, but it is not to be extended beyond its reason. That reason is, the obligation of the parent to maintain and educate his child, according to his condition in life, and has reference altogether to the condition of the parent. But where the child has a large fortune, there may be a difference. In England, the parent may obtain an allowance by order of chancery. Here he must act, and justify afterwards. In this case the parent could maintain and educate; but not in correspondence with the child's fortune. It is desirable that the court should lay down a rule, which may be a guide in future cases. On

this point were cited, Sherwood *v.* Smith, 6 Ves. 454; Sisson *v.* Shaw, 9 Ib. 285; Darlington *ex parte*, 1 Ball & B. 246; Maberly *v.* Turton, 14 Ves. 499; Cooper's Cases.

2d. That the guardian was legally and equitably entitled to a commission of five per cent. on the amount received by him. That this was no more than a just and reasonable compensation for his care, trouble, and responsibility. In the twenty years of the guardian's service, the estate did not suffer the loss of a dollar, and had been more than doubled. There was no ground for a charge of infidelity, and this being the case, anything less than the commission would be dealing a hard measure of justice to the guardian.

3d. As to the interest, the guardian is to be charged according to one of the three principles,—that suggested by himself; that proposed by the trustees, or that created by the auditors. By the first, if the guardian had acted faithfully, he is chargeable with the interest he has actually made, and no more. By the second, he is chargeable with the interest compounded at short rests, and by the last, he is charged with interest on all moneys receivable, allowing sixty days for investment. The question to be decided is, which of these principles is the legal and correct one? The first appears to be the most reasonable, and has the sanction of authority to support it. It supposes fidelity and vigilance; and leaves it open to the opposite party, to show the want of them, to induce the application of a stricter rule, or to apply what may be considered a mulct or penalty on the guardian. If he is faithful and vigilant, what more can be reasonably asked for, than the actual fruit of the guardianship? On what principle ought he to be required to pay more than has been earned by a faithful and vigilant man? If it be said, that more might possibly have been made, and he shall be chargeable with all that might possibly be made, surely no man of real wisdom and integrity would accept the trust on such terms.

[*329] *The rule suggested by the trustees of compounding the interest, is applied in no case, but as a penalty for misconduct: and from its severity, it should be applied in no other case. It is said to be the rule of common life. It is

only necessary to state what is the rule, and the reason of it; to show its inapplicability here. In the one case, the party is a debtor to pay interest. In the other, a trustee to take care and earn interest.

The rule assumed by the auditors is objectionable on two grounds; first, because it assumes that the guardian might collect interest, and put out to interest within three months; and secondly, because it charges him with six per cent., when he could make but five. The great objection to these rules is, that they may do the greatest injustice; they may charge a man with much more than he could possibly have made. The case before the court is of a father desiring to do the best for his son and ward, and having the strongest incentive to vigilance and fidelity. It is wrong to suppose that he would voluntarily omit to do what was for his son's interest, and such a supposition is certainly negatived by the evidence, from which it is perfectly clear that at several periods only five per cent. could be obtained.

The decisions cited on this point were, Elkins *v.* East India Company, 1 P. Wms. 396; Forbes *v.* Ross, 2 B. C. C. 430; Clarkson *v.* De Peyster, 1 Hopk. Ch. 424; Pim *v.* Downing, 11 Serg. & Rawle, 67; Johnson's Appeal, 12 Ib. 317; Bonsall's Appeal, 1 Rawle, 266; English *v.* Harvey, 2 Ib. 305; Walker's Est., 3 Ib. 250; Say *v.* Barnes, 4 Serg. & Rawle.

The opinion of the court was delivered by

Gibson, C. J.—The exception to the semi-annual balances, taken by the trustees, depends on matter involving distinct grounds of fact—the supposed proof that some of the mortgages were had at a discount—and the supposed want of proof that the accountant had paid the interest which accrued between the last day of its payment and the day of purchase.

The cause has been argued on this exception, as if the matter were *res integra*. The degree of weight due to a report of auditors has not, I believe, been determined; but the parties certainly do not stand here as they stood at the hearing. It was the business of the auditors not merely to collect proofs for adjudication by the court, but to adjudicate themselves

subject to exceptions, and that they report the proofs at all, is but to assist the court in the determination of those exceptions. They may, if they think fit, refer the facts to the court upon the proofs, and when specifically instructed, it is their business to do so; but here their authority was unlimited, and they have exercised it by an adjudication which comes to us with the testimony, but possibly not with all the concessions [*330] on which it was *founded. It seems reasonable that such a report, like the verdict of a jury, or an award of arbitrators under the act of 1705, be not set aside in whole or in part, except for plain mistake, which it is the business of the exceptant to establish by affirmative evidence where it is not self-evident in the report. It cannot appear that all the matters adverted to were in contest; and the court cannot know what may have been tacitly admitted or taken for granted. Touching the intervening interest, there is no proof either to contradict or to sustain the report; and we are to take it the auditors proceeded on sufficient grounds. In respect to the mortgages purchased of Gibbons, Andrews, and Elliott, there is indeed loose and indistinct testimony that they were obtained at a discount; but the auditors might well disregard it, especially as the witnesses spoke from recollection, and the entries of the transactions referred to and admitted to be contained in their books, were not produced.

The compensation, which forms the subject of the second exception of the accountant, and the third of the trustees, seems to be a reasonable one. Though usually awarded in the form of commission, the rate is not determinable by any established practice or rule, being graduated to the responsibility incurred, the amount of the estate, and the sum of the labour expended. It may be awarded even in a gross sum, according to a common practice in the country, which I take to be the preferable one, as it necessarily leads to an examination of the nature, items, and actual extent of the services; which the adoption of a rate per cent. has a tendency to leave out of view. To adopt the same rate in all cases would often produce a monstrous overcharge. In the case before us, the commission is rather less than five per cent., which, for the management of a fund of

some forty thousand dollars, accumulated to a hundred thousand in twenty years, gives a sum to which, whatever be the operation by which it is attained, objection cannot be taken by either side, and this to compensate not only for labour expended, but for responsibility and expenses incurred in litigation.

The credits for maintenance and education, and for expenses in the voyage to England, embraced in the accountant's first exception, were properly disallowed. The whole subject was disposed of by the simple admission of the accountant's ability. It is alleged that the admission went no further than his ability to raise the means, but not without injuriously impairing his means of educating and supporting his other children. If the fact were so, it would undoubtedly make a fair exception to the rule, which requires a father to support his child with the father's substance. But that is not the tone of the admission as it is reported to us; and if the allegation that such was actually the fact be founded, it has not been shown to us. The expense of the voyage stands on the same footing. The purpose of it being a necessary one, and the means unattainable without recourse to the guardianship fund, or injustice to the other children, *the guardian might with propriety have applied the former without an order of maintenance. Indeed it would seem that no authority to make such an order was lodged with any part of our judiciary, the effect of it having, at the time material to the question, been attainable indirectly, in the way pointed out in Potts's Case, Ashm. R. 340. But it is well settled that chancery will allow even for past maintenance, where the father was not of competent ability. Nothing of the sort, however, is reported to have been shown to the auditors, and certainly nothing of the sort has been shown here. [*331]

The interest account is the subject of the third exception of the trustees, and of the third and fourth of the accountant. Interest is charged on the moneys collected, or that in the opinion of the auditors ought to have been collected, allowing an average of three months for investments, instead of charging the interest actually made on principal and interest received—a process which produces compound interest, though

the introduction of rests has not necessarily that effect—the propriety of which, even in the most flagrant case, seems not to be entirely settled, at least by common consent. The subject was elaborately investigated in the matter of M'Call's Estate, Ash. R. 357; and though I concur in the propriety of the order of confirmation, I am unable to concur in the abstract conclusion of the auditor, that compound interest can be awarded under no circumstances, at least against an administrator; and that the decree in Schieffelin *v.* Stewart, is not sustained by the British authorities extant when it was pronounced. One of the latest of them, embracing the concurrent opinions of Lords Rosslyn, Eldon, and Erskine, pronounced in Raphael *v.* Boehm, which was elaborately argued and solemnly adjudged, twice by Lord Eldon, is direct to the point. It is but of little account that the preceding decisions had not carried the principle so far. It was at one time notoriously the course of the court to charge no interest in any case; but no one would pretend that a respect for the original practice, admitted on all hands to have been unjust, ought to raise a doubt of the soundness of that which superseded it, which giving a compensation graduated sometimes to the measure of chancery interest, and sometimes to that of legal interest, according to circumstances, was founded, so far as it went, in the immutable principles of justice. The law was in a state of progression, and the new practice was a point gained in the march of improvement. But it was not the ultimate point; and it is therefore not easy to apprehend how the decree in Raphael *v.* Boehm was an insufficient foundation for a similar decree in the state of New York, where British precedents since the declaration of independence are not prohibited. The rule of compound interest may doubtless be thought to have been mitigated, if not abolished, in that country by subsequent decisions. But to say nothing of the fact that these decisions were by judges of inferior degree—two of *them at the Rolls, and the other by the Vice Chancellor; and for that reason not binding on the chancellor there, yet in the last of them, where the authorities are compared, a distinction was well taken between

[*332]

negligence and corruption, with an intimation that a special case is necessary to induce a charge of more than four per cent., but without a direct affirmation that a special case might not be such as to warrant the allowance of more than legal interest. It was accurately said, that the omission to invest a balance which the executor was bound to put out by his general duty or the directions of the will, is negligence and not misfeasance; and that it subjects him to interest, but at the chancery rate. But what the Vice Chancellor would have said of a deliberate violation of the trust, by trading with the fund and refusing to account for the profits, is left to conjecture; and I am unable to discern in the report of the case, a sufficient reason for the interpretation of the auditor in the matter of M'Call's Estate, that the consequence of the distinction between negligence and corruption, was supposed to be but a greater or less degree of simple interest; or that his decision, whatever may be the current of the earlier cases, is in direct and uncompromising collision with Schieffelin *v.* Stewart. There is a breadth of outline in the language of the Vice Chancellor, which, while it sufficiently indicates the bent of his inclination to be against the doctrine of Raphael *v.* Boehm, seems purposely intended to avoid an unqualified denial of the legality of compound interest in any case. To say the least, then, the English decisions have left the question an open one.

In the United States, as in England, it is embarrassed by conflicting opinions. Schieffelin *v.* Stewart stands unimpeached by subsequent decision in the state of New York. It is recognized as furnishing the rule by Vice Chancellor M'Coun, in the late case of Garniss *v.* Gardiner, 1 Edwards' R. 130; and it is not impugned by Jones *v.* De Peyster, 2 Wendell, 77, which was a case of omission, and whatever the court may have thought of the doctrine in cases of corruption, not a legitimate subject of it, though more than compound interest seems to have been given in fact. In South Carolina, the legality of it in extraordinary cases, seems to be conclusively established by the court of the last resort in Wright *v.* Wright, 2 M'Cord's Ch. R. 200, and Myers *v.* Myers, Ib. 266, in which the doubts

about it that had been entertained in that state, were put at rest. In Maryland, also, it is established by the highest tribunal of the state, in Ringgold *v.* Ringgold, 1 Harris & Gill, 79, and Diffenderfer *v.* Winder, 3 Gill & Johns. 345; and in Massachusetts by the Supreme Court in Robbins *v.* Hayward, 1 Pickering, 345, where the doctrine as decided in Fay *v.* Howe (*in notis*) is recognized and assented to. In Virginia alone it seems to have been rejected. In our own state we have no decision directly on the point. Harvey *v.* English, 2 [*333] Rawle, 308, was a case of negligence, and therefore not *a subject of the rule, as were Fox *v.* Wilcox, 1 Binney, 194, and Say *v.* Barnes, 4 Serg. & Rawle, 116. The weight of American authority in favour of the rule, therefore, stands as four to one.

And why should it not be sustained on principle? It is a fundamental rule of equity that a trustee shall not make profit of the fund for himself; and the substitution of interest for profits not ascertainable, is but a modification of it. Such being the admitted basis of the rule, no colourable reason can be assigned why it should not be applied as well to an administrator who has used the trust moneys without having accounted for the profits, as to an executor or trustee bound by instructions, or the nature of his office to invest for accumulation. If he trade with moneys of the fund, he shall, like any other trustee, make good the loss or render the gain; and where it is indeterminate by reason of his refusal to account (always an index of fraud) the presumption is, that it was at least equal to simple interest for the year, and that being in his hands at the end of it, it became capital and made gain in its turn. If it were no greater in fact than simple interest for the period, he has no more to do, in order to get rid of the presumption of compound profits, than to show the truth by exhibiting the accounts. While he stands out, the presumption that he made more than the sum obtained by the method of competition employed against him, is an irresistible one, else the result would make it worth his while to disclose the truth. If he kept no accounts, he cannot murmur at the adoption of that rule of computation which is most beneficial to the fund, and but a

[In the matter of Harland's accounts.]

reasonable penalty for his negligence. Interest is payable periodically; and the matter resolves itself into a question, whether a trustee may superinduce a state of things that shall give him the benefit of its earnings in prejudice of the fund. Take the case of an executor plainly bound to accumulate, who deliberately disregards his testator's directions to reinvest, and becomes a borrower from the fund at simple interest: shall not the interest as it falls due, be principal in his hands as it would have been had he received it from a stranger? In such a conjuncture it is impossible to conjecture how the fund can be rightfully left in a less prosperous condition than it would have retained, had he re-invested according to the terms of the will. To suffer a trustee to elude the conditions of the trust, by borrowing from it at simple interest, and using the proceeds for his own advantage, would offer an irresistible temptation to maladministration by enabling him to benefit by his own wrong. That interest should not bear interest, is not a dictate of justice, but the effect, in particular cases, of arbitrary enactment founded, it is thought by some, in a questionable policy; and in a case distinctly out of the purview of the statute, where the statutory measure is arbitrarily but necessarily assumed for the computation of profits, there is no imaginable reason why the product should not be compounded where there is reason to believe that the profits were compounded; or why the *party beneficially entitled should not be put in the [*334] condition that a conscientious discharge of the trust would have put him. In a case of negligence or omission consistent with good faith, policy dictates a more indulgent course, such as was pursued in Harvey *v.* English, where however the indirect influence of the statute appears to have produced the declaration, that as no man can get compound interest from his debtor in his lifetime, it is not certain that he can subject those who come after him to it. In a case like the present, the parties certainly do not stand in the common relation of debtor and creditor.

Granting then that compound interest may be assumed as the rate of computation in extreme cases, what is the character of the case before us? A decisive feature of it is, that

there is not a particle of proof that the accountant traded with the moneys of the trust, or employed them in his business, at least without charging interest as principal; or that he refused to render fair accounts of all his transactions. The auditors say that it was not shown that he had kept the trust moneys separate and distinct from his own; which however would make but a case of negligence. But neither was there evidence of commixture; and whatever may have been the state of the proof before them, or the consequences of it in reference to the *onus*, it certainly has been distinctly shown here, that the moneys were regularly deposited in bank to the credit of the trust; whence they were drawn on checks for investment or repayment of advances made to secure an advantageous purchase when the moneys on hand were insufficient to complete it. These purchases were made in the name of the guardian; and hence an argument that the bargain was susceptible of being set down to his own account when a good one, and to the account of the ward when it proved otherwise. But the evidences of the transaction, always accessible to the ward, would show the purchase to have been made with his money, and defeat an attempted fraud by creating a resulting trust for him. In conclusion, it is but just to say that the estate has been managed with an uncommon degree of fidelity, care, and discretion, the fruit of which is an accumulation of it to more than twice its original amount in a period of twenty years, and without the loss of a dollar; that there has been no unnecessary delay in the business of investing; and that the omission to invest a part was produced by a mistaken but honest belief, that the maintenance and education of the ward were to come from it. The accounts are therefore remanded to the auditors with directions to charge the accountant with the interest actually made on sums invested, computed from the date of each investment; and with simple interest on the uninvested sums retained in his hands, computed from the receipt of each: but with no more.

Ordered accordingly.

Cited by Counsel, 4 Wh. 99; 5 Wh. 476, 537; 6 Wh. 403; 8 W. & S. 366.

[In the matter of Harland's accounts.]

9 Barr, 430; 2 J. 349; 10 H. 511; 6 C. 473, 488; 12 C. 137, 181; 5 Wr. 498, 500; 1 G. 170; 2 G. 306, 383.

Cited by the Court, 7 W. & S. 62; 1 H. 190; 3 S. 503.

Approved in 5 Barr, 416.

In 21 S. 123, it is said, in the opinion of the lower court (adopted by the Supreme Court), that no case in Pennsylvania can be recalled in which a trustee has been charged with compound interest, although many cases of very gross delinquency have been before the court. In 5 N. 234, s. c. 5 W. N. C. 347, the cases regarding compensation to trustees are discussed, and this case approved as establishing the rule that compensation is the *pole star*, although a commission is often a good way of getting at the right sum.

*[PHILADELPHIA, APRIL 16, 1835.] [*335]

Allen and Martin *against* Myers and Others.

IN ERROR.

Upon an application by a party collaterally interested, to open a judgment confessed, the cause was by agreement referred to an auditor voluntarily chosen by the parties, to report the amount due the plaintiffs. The auditor made a report, upon which the court rendered a judgment. Held, that such a judgment was not the subject of a writ of error.

THIS was a writ of error to the District Court for the city and county of *Philadelphia*.

Martin and Allen being about to sue out a mechanics' claim for work done, an amicable *scire facias*, with a confession of judgment, for the sum of one thousand three hundred and thirty dollars and fourteen cents, was entered on the 13th of October, 1831, signed by Myers, Hoover, and Mackway, the defendants.

On the 15th October, 1831, on motion of Mr. Miles, for certain lien creditors, the court below granted a rule on the plaintiffs, to show cause why the judgment should not be opened, and the lien creditors be permitted to take defence.

On the 21st of April, 1832, during the hearing of the rule by agreement of counsel, the claim was referred to an auditor, named by them to report the amount due upon the claim filed.

He reduced the amount of the plaintiffs' claim to the sum of nine hundred and thirty-five dollars and thirty-two cents.

It appeared from the report of the auditor, that Myers, the defendant, in the spring or summer of 1830, commenced the erection of a building, designed for a place of worship, and that the plaintiffs, who were plasterers by trade, did work at the same, by plastering the whole of the outside, and a considerable part of the inside, until the undertaking was stopped by the insolvency of Myers. For this work, the plaintiffs claimed the sum of one thousand three hundred and thirty-seven dollars and thirty-six cents, consisting of the following items, viz.:

Amount of work per measurement, ...	$1,301 84
Hauling sixty-four loads, ...	16 00
Half of measurement bill, ...	19 52
	$1,337 36

Two witnesses produced by the plaintiffs, testified that they had measured the work, and that the measurement bill returned by them was correct, and the amount stated at the lowest cash price, according to their book of rates. On the part of the other lien creditors *it was contended that the plaintiffs had contracted with Myers, to do the whole work at a price considerably less than the amount claimed for a part performance; as to which, however, the testimony was not explicit; and that supposing no contract was in fact made, yet the sum claimed, was excessive and unreasonable. Upon this point, five witnesses were examined, besides the measurers. From the estimates furnished by these witnesses, the auditor rejected the rates fixed by the society of plasterers, on the basis of which the measurement bill was made out, and reduced the plaintiffs' claim to the sum of nine hundred and thirty-five dollars and thirty-two cents.

[*336]

On the 2d July, 1832, a rule was obtained by the plaintiffs, to show cause why the report of the auditor should not be set aside, and an issue granted to the plaintiffs.

The court however dismissed the exceptions to the report, and it was accordingly confirmed. Whereupon, the plaintiffs brought this writ of error, and assigned the following errors:

1. The court below erred in refusing the plaintiffs the benefit of an issue.

2. The court erred in confirming the auditor's report:—

1. Because the auditor did not state the evidence in his report, as it was given to him by the witnesses.

2. The auditor erred in rejecting the testimony of the measurers' bill, supported by their oaths, it being the best and only and usual evidence resorted to, where there is no contract between the parties, to ascertain the extent and value of the work done.

3. The auditor erred in not allowing the plaintiffs for putting up and taking down the scaffolding, which added to the sum allowed by him, would have made the whole amount claimed by plaintiffs.

4. The auditor erred in allowing evidence of estimates to be given, not as to the value of the work done, and the extent of it, but of other work never performed.

5. The auditor erred in reducing the plaintiffs' judgment; it having been proved to have been founded on the express directions of the party to the contract, and upon his acknowledgment of record of its correctness and justice.

6. The auditor erred in allowing any evidence to be given, to impeach the amount of the plaintiffs' judgment, after a failure to prove a specific contract, there being no fraud imputed to plaintiffs.

7. The auditor erred in allowing the lien creditors to impeach the amount of the plaintiffs' judgment upon record, inasmuch as they had no right in law to do so, except upon the ground of fraud—and there was no allegation of fraud.

8. The auditor erred in law and in fact.

9. The court below erred in law and fact.

Jack, for the plaintiffs in error, contended,—

*1. That the court erred in refusing the plaintiffs the benefit of an issue, and cited act of 16th of April, [*337]

1827, sec. 2, Haly & Troubat's Digest, 41, 42, and was proceeding in his argument, when—

Miles, for the defendants in error, suggested that this judgment was not the subject of a writ of error. That in the court below, the parties had voluntarily withdrawn the cause from the court, and nothing upon the face of the record or otherwise, of fraud or corruption in the auditor, was hinted. If it were, it could not be entertained in error; it was a fact to be alleged in the court below. Wilson *v.* Commonwealth, 3 Penn. Rep. 531; Andrews *v.* Lee, Ib. 499; Cahill *v.* Benn, 6 Binn. 59; Galbraith *v.* Colt, 4 Yeates, 551.

Jack, contra, cited Kline *v.* Guthert, 2 Penn. Rep. 396; Bellas *v.* Levy, 2 Rawle, 21; Gratz *v.* Phillips, 14 Serg. & Rawle, 151.

Per Curiam.—The parties here withdrew the case from the action of the court below, and voluntarily submitted it to an auditor chosen by themselves, who was "to report the amount due upon the claim filed," which was the subject-matter in dispute. By the submission, he was not even to report the facts, and even if he had, unless the parties had agreed by the submission, that such report should be a subject of error, or that the same should be taken as a special verdict or case stated, this writ of error would not be sustainable. Wilson *v.* Commonwealth, 3 Penn. Rep. 532.

Judgment affirmed.

Cited by Counsel, 4 W. & S. 233.

*[PHILADELPHIA, APRIL 16, 1835.] [*338]

In the Matter of Koch's Estate.

APPEAL.

The 41st section of the act of the 24th of February, 1834, which directs, that when a distributee of an intestate's estate is unable to give the security to refund, required by the act, the fund shall be put at interest on security approved by the Orphans' Court, includes cases pending at the passage of the act.

THIS was an appeal by M. H. Messchert and H. Messchert, administrators of Jacob Gerard Koch, from the decree of the Orphans' Court, for the city and county of Philadelphia, made in the matter of their accounts.

The following exceptions were taken by H. Messchert, surviving administrator.

First. That the report of the auditors made on the 3d day of November, 1832, and the decree of said Orphans' Court thereupon, whereby a distribution of a moiety of the balance in the hands of said administrator, was made to the following named persons, and in the following proportions, viz.:

To Maria Anna Leizman,	6-18ths.
" Maria Helena, now wife of Francis Bringhorst,	3-18ths.
" Franciscus Josephus Koch, a minor,	1-18th.
" Jacobus Gerardus Johannes Koch, a minor	1-18th.
" Aloysia Constantina Francisca Koch, a minor,	1-18th.
" Christiana Maria Jacoba Cranenburg,	1-18th.
" Gerardus Ludovicus Koch,	1-18th.
" Jacobus Petrus Franciscus Koch, a minor,	1-18th.
" Ludovicus August Koch, a minor,	1-18th.
" Johannes Jacob Koch,	1-18th.
" Maria Gertrude Koch,	1-18th.

was made without any evidence of a legal character, showing the said parties to be the heirs at law, or persons entitled by law to any portion of said moiety, upon very short and

insufficient notice to the parties interested, the whole of said evidence consisting of copies of papers, in languages with which said auditors were not at all, or very imperfectly acquainted, which said copies were in no respect verified by legal testimony or evidence of any kind whatever, and the said notice having been published in the city of Philadelphia, for eleven days only previous to the meeting of the auditors, though all the parties in interest to be bound by said report and decree, reside in Europe and out of the United States.

[*339] *Second. Because, by the decree of the 21st of December, 1832, the said Orphans' Court decreed payment of the said Maria Anna Leizman, Francis Bringhorst, and Maria Helena, his wife, P. V. Cranenburg and Christiana Maria, his wife, Gerardus Ludovicus Koch, Johannes Jacobus Koch, and Maria Gertruda Ludovicus Koch, upon their leaving in the hands of the said administrators for the present, and until sureties can be had, a portion of their respective shares, instead of giving to the said administrators bonds with sureties, that if any debt or debts truly owing by the intestate, shall be afterwards sued or recovered, or otherwise duly made to appear, the said parties shall respectively refund to the administrators, his or her ratable part of such debt or debts, according to the provision of the act of assembly in such case made and provided.

The case was argued by *Sergeant*, for the distributees, and by *Ingraham* and *Tilghman*, for the administrators.

The opinion of the court was delivered by

SERGEANT, J.—It is the opinion of this court, that the decree of the Orphans' Court of the 10th of January, 1833, substituting a retention of money in the hands of the administrators, in lieu of security to refund, was not authorized by the act of 19th of April, 1794, for distribution of intestates' effects.

The 15th section of that act, requires security to be given in all cases.

[In the matter of Koch's Estate.]

After a decree of the court below, the act of assembly of the 24th of February, 1834, embracing the new code on this subject, was passed, and on the 1st of October last, came into operation. The question now presented, is whether the 41st section of that act, applies to the case before the court; for, if it does, then the object designed by the court below in making their decree, may be attained.

The 41st section of the act of 1834, after providing that the distributee, before receiving any share of the estate, shall give real or personal security, in such sum and form as the court shall direct, with condition to refund, if any debt or demand shall be recovered or appear, enacts, that, "if the person or persons entitled to receive the same, is or are unable to give the security aforesaid, then the money shall be put at interest, on security approved by the Orphans' Court, which interest is to be paid annually to the persons entitled to it, and the money to remain at interest, until the security aforesaid is given, or the Orphans' Court, on application, shall order it to be paid to the person or persons entitled to it." How far this provision applies to the present case, depends on the true construction to be given to the repealing clause of the act, contained in its last section, which is as follows: "this act shall take effect from and after the 1st day of October next, and all such acts of assembly as are hereby altered or supplied, shall be and hereby are repealed, except so far *as may be necessary to finish proceedings commenced, or to settle the estates of persons who have died before that time." Sec. 79. [*340]

The 15th section of the act of 1794, is both altered and supplied by the 41st section of the act of 1834. It is, therefore, repealed unless it falls within the exception. But it does not fall within the exception, because it is not necessary either to finish proceedings commenced, or to settle the estate of persons dying before the 1st of October, 1834. On the contrary, another provision on the subject is introduced by the last act better adapted to the emergencies that may arise, and quite as safe, for all concerned, whether administrators or heirs. This is no reason, therefore, why the 15th section of the act of 1794

should not be considered as totally repealed, and the new section substituted forthwith.

The exception had other objects in view: it was designed to preserve the old law in force, in certain cases, where it would have been attended with inconvenience and mischief, not to do so. In the first place, it was right and proper that what had been done under the old law, in cases commenced and undetermined, should be preserved and completed; but if the law under which the proceedings had been carried on, were repealed, without any saving clause, all that had been previously done might be swept away, and the business must begin *de novo*. Cases of hardship have occurred by this inadvertence in legislation, 4 Yeates, 392; 1 Watts, 382; 1 W. Bl. 451. In the next place, certain parts of the old law ought to be preserved for the settlement of the estates of persons who died before the new law came into operation, though proceedings were not commenced; because vested rights may have occurred under the old law, which ought to be regulated by it. Thus, for instance, the act of 1834 abolishes the former distinction, in the payment of debts, between specialty and simple contract creditors, and puts them on a footing. Sec. 21. But this provision ought not to apply to the cases of persons dying before this act came into operation; if it should, the act would be retrospective, which it ought not to be. Therefore, the old law is to remain in force in such cases, for the settlement of estates and the adjudication of rights, attaching under the former act. But other parts of the new act, which are merely remedial, which affect no rights, but remove inconveniences, and enlarge the benefits of the law, ought to have immediate effect and operation; and this may fairly be intended to have been the meaning of the legislature. In remedial statutes everything is to be done in advancement of the remedy, that can be done consistently, with any reasonable interpretations to be given to them. Cowp. 391; 3 Dow. 15. Sometimes the same statute, so far as it is penal, receives a strict construction, and so far as it is remedial is liberally construed. 1 Barr, 6; 7 Co. Litt. 238, *a*. It is no objection to legislative action, that it operates

[In the matter of Koch's Estate.]

on pending cases, where it affects the remedy only, and *touches no right, nor inflicts any forfeiture, penalty, or loss. 10 Serg. & Rawle, 101; 16 Serg. & Rawle, 35, 91; 1 Binn. 601. [*341]

In this case the distributees are unable to obtain the security required by the first decree of the Orphans' Court. But by the investment of the money under the act, justice will be done to all parties; the administrators will be secured, and the heirs will receive the interest, until they become entitled to the principal, by furnishing security or otherwise. And there is no reason why a statutory provision, so just and beneficial in its effects, and so innocent in its character, should not be the rule of law, to regulate all cases, as well pending, as new ones, both by the letter and spirit of the act of 1834.

Decree accordingly.

The court made the following order:

It is hereby ordered, adjudged, and decreed, that the decree of the Orphans' Court, so far as the same orders and decrees distribution to be made among the several distributees named in the report of the auditors, and decrees and orders the administrator to transfer into their respective names, their respective proportions, as reported by the auditors of the several stocks to be distributed, and to pay to them respectively, or to their agents duly appointed, their respective proportions of the money to be distributed as reported by the said auditors, be and the same is hereby confirmed; and that so much of the said decree or decrees, as directs the amount and nature of the security to be given by the said distributees, be and the same is hereby reversed, as being in the judgment of this court, not authorized by the law in force at the time when the said decrees were made by the said Orphans' Court: and this court proceeding further to do what to right and justice appertains in said case, hereby directs, orders, and decrees as follows, that is to say, first, that the said Orphans' Court do forthwith proceed to fix the amount and nature of the security to be given, agreeably to the terms of the forty-first section of the act of the 24th of February, 1834, according to its discretion

given by the said act. Secondly, upon security being thus provided, to enforce the said decree of distribution, and, thirdly, to cause an account to be rendered and settled, of the profits, income, or interest that have been, or ought to have been made, from the said stocks and moneys, since the said decree, and the same to be distributed among the said distributees according to their respective rights and proportions. And this court hereby remands the record to the Orphans' Court, for the purpose of executing the decree of this court, made as aforesaid, and of doing all such other matters in the premises, as in law and equity it may belong to the said Orphans' Court to do; and it is further ordered that the costs of this proceeding be paid out of the fund.

[*342] *[PHILADELPHIA.]

Moliere *against* The Pennsylvania Fire Insurance Company.

Policy of insurance against fire expressed to be made according to certain conditions, one of which provided that the insured should deliver to the secretary of the insurers, a particular of what materials the walls and roof of the building insured are constructed, and that if any person should insure his or their building, or goods, and cause the same to be described in the policy, otherwise than as they really are, so as the same be charged at a lower premium than therein proposed such insurance should be of no force. In an action by the insured against the insurers, who took defence on the ground of an alleged misdescription of the premises in the policy, Held, that parol evidence was admissible, that the misdescription if any, arose from the mistake of the secretary of the insurers, to whom the buildings were particularly and accurately described at the time of the insurance.

The first argument of a case is matter of right; reârguments are subject to the order and direction of the court.

THIS was an action on a policy of insurnce against fire, dated 11th of February, 1826, No. 505, originally made for one year, and afterwards renewed from year to year, by indorsements on the policy. The premises insured (which with their contents were totally consumed by fire, on the 19th June, 1829,) were described in the policy, and in the order of insurance as "a

brick ice-house, one story high, and about forty feet square—also, a brick ice-house adjoining, one story high and about thirty-two feet square, situated on the east side of George street, between Shippen and Plumb streets, and also, on the ice which now is, or may be contained in the said houses."

The policy was expressed in the body of it, to be made by the defendants "according to the tenor of their printed proposals, and conditions hereunto annexed." The first of these conditions is in these words—

"Persons desirous to make insurance on buildings are to deliver to the secretary of the company the following particulars, viz.:

"1st. Of what materials the walls and roof of each building are constructed, as well as the construction of the building contiguous thereto.

"2d. Whether the same are occupied as private dwellings, or otherwise.

"3d. Where situated.

"4th. The name or names of the present occupiers. Each building must be separately valued, and a specific sum insured thereon, *and in like manner, a separate sum insured on the property contained therein. [*343]

"In the insurance of goods, wares, or merchandise, the building or place in which the same are deposited, is to be described; also whether such goods are of the kind denominated hazardous, and whether any manufactory is carried on in the premises. And if any person shall insure his or their building or goods, and shall cause the same to be described in the policy, otherwise than as they really are, so as the same be charged at a lower premium, than is herein proposed, such insurance shall be of no force."

The amount and rate of insurance was, as stated in the order and policy of insurance.

$1,200 on the first mentioned house,
600 on the other,
1,000 on the ice in the first mentioned house,
600 on the ice in the other,

$3,400

[Moliere v. The Pennsylvania Fire Insurance Company.]

Sum to be insured, $3,400 a 50 cents per 100, . . $17
Policy, . . 1
$18

It appeared by the rates of insurance, in one of the expired renewals indorsed on the policy, that the premium on the ice was estimated at twenty-five cents per one hundred dollars, which applied to the ice and building at the date of the policy, showed that the above average rate of fifty cents on the whole, was equal to say seventy-two cents on the houses, and twenty-five cents on the ice.

The plaintiff having read the order and policy, and the renewals indorsed on it, gave in evidence a correspondence with the defendants, in which, shortly after the fire they stated, that, "from the representation made to them of the buildings intended to be insured, and the description in the order and policy, they did not consider themselves liable, &c."

He then produced as a witness, Frederick G. Wolbert, who proved the loss of the ice-houses and their contents by fire, the quantity and value of the ice contained in them when burnt, and gave a description of the ice-houses before his testimony was objected to.

The description as given by this and the other witnesses was, that these ice-houses were cylindrical wells of brick, of depth about equal to their diameter, paved with brick at the bottom. The walls were of brick, raised above ground about seven to ten feet, and terminating at the roof which rested upon them. The principal superstructure was the roof, which was of great height, and extended over and beyond the brick walls downwards, until it met a square wooden weatherboarding, which formed a fence or shelter for the ice-houses, at a [*344] sufficient distance from the walls to allow the *necessary ventilation. Thus the exterior of the ice-houses was altogether wooden; the woodwork consisting of the roof and weatherboarding. This weatherboarding was a necessary protection against heat, and without it the ice could not have been preserved. There was no more wood work about the ice-houses than was necessary for the purpose of an

ice-house, and the mason work was raised above the ground to a greater height than is usual in the largest ice-houses. (Of fifteen witnesses examined, ten testified that their correct denomination was brick ice-houses.)

The plaintiff having offered to prove by the same witness what took place at the time the insurance in question was effected, the objection was made which the judge overruled.

This testimony was offered for the purpose of proving, that at the time the insurance was made, the plaintiff had "delivered to the secretary of the company," a particular description of the ice-house in a memorandum, which was left with the secretary, and had been since lost by him, (due notice having been given to produce it at the trial,) and further, that the plaintiff had at the same time verbally at great length, minutely described to him the ice-houses as they really were, omitting nothing that was calculated to enhance the premium, but on the contrary, disclosing in the fullest manner the construction and materials of every part of them; and that the order was then written down by the secretary, to suit himself, with his own hand, &c.

The cause was tried before Mr. Justice Rogers, at Nisi Prius, the 26th of November, 1832. A verdict was found for the plaintiff, for three thousand one hundred and sixty-seven dollars, thirty-five cents. The defendant now moved for a new trial, and assigned for reasons:—

1st. That the court admitted the evidence of F. G. Wolbert, to prove a *parol* contract, different from the contract upon which the suit is brought.

2d. That the verdict of the jury was against the charge of the court, and against the evidence.

There was no specification of the points to be relied on, in support of this reason.

Kittera and *Chauncey*, for the defendant, contended in support of the motion:—

The effect of the decision is to substitute the verbal agreement of the officer of the corporation, for the covenant executed under the seal of the corporation, and to try an issue different

from that presented by the record, and to meet which the defendant would be without notice. All negotiations prior to, or contemporaneous with an agreement under seal, are merged in it. Parkhurst *v.* Van Courtland, 1 John. C. C. 273; Patterson *v.* Hall, 9 Cowen, 784. The policy itself is considered to be the contract between the parties, and *whatever [*345] proposals are made or conversation had between the parties prior to the subscription, they are to be considered as waived, if not inserted in the policy, or contained in a memorandum annexed to it. 13 Mass. 96, 99; Higginson *v.* Dall, 1 Penn. Rep. 417.

The general rule undoubtedly is, that when by consent of parties, their agreement is reduced to writing, parol evidence is not admitted to contradict, alter, or vary it. The exceptions to the rule, it is not easy to state with clearness. It is allowed in cases of fraud or mistake, to defeat the writing, and to explain the meaning of doubtful terms, and to establish trusts. The general doctrines on this head are collected in 3 Stark. Ev 994, 1002; 13 Petersdorf, 108. He then examined the cases decided in this court, for the purpose of showing that they fell short of the present case, and cited in addition, King *v.* Baldwin, 2 John. C. R. 554; Schermerhorn *v.* Vanderheyden, 1 John. 139; Erwin *v.* Saunders, 2 John. C. R. 585; 1 Cow. 249; 1 Hopk. C. R. 124, 134; Jefferson Ins. Co. *v.* Cathrell, 5 Wend. 541, 547; 7 Ib. 72. An application for an insurance is not a warranty, unless inserted in the policy. A description in the policy is a warranty that the property is as described, and it matters not whether the misdescription is the result of fraud or mistake. Fowler *v.* Etna Fire Ins. Co., 6 Cow. 673; 7 Wend. 27. A slip of paper to show that the order of names was different from those in the policy, was rejected. 11 Petersdorf, tit. Ins. 97, cites Masden *v.* Reed, 3 East, 572. Supposing that a mistake in drawing articles, may be proved by parol, yet in an action of covenant on written articles, the plaintiff cannot prove by parol evidence, an agreement different from that on which he has declared. Barndollar *v.* Tate, 1 Serg. & Rawle, 160.

The object of the testimony is to show, that the order as

reduced to writing by the secretary of the company, did not correspond with the directions given by the plaintiff. But the order is not the act of the company. It matters not by whom it is written: it is signed by the assured, and is exclusively his act. In a case of fraud, indeed, as if one order was written and read to him, and another substituted for it, such evidence would be admissible. But fraud is not alleged. The plaintiff offers to prove by parol, that the order is not what he gave, but is the secretary's conclusion from another description. This he cannot do. The order is his own. Mr. Smith had never seen the property, and if the plaintiff employed him as his agent to write the order, from a verbal description which resulted in the written order, with which he was satisfied at the time, he shall not be permitted after various renewals of the policy, years afterwards to say that he had not sufficiently reflected upon the language of the order.

The plaintiff contends that the inaccuracy was the mistake of the defendants themselves. But the order cannot be considered in any other light, than as the sole and exclusive order of the plaintiff. It is the business of the officer to receive the order, and to say yes or *no; but not to construct the order. It is not within his power so to bind his principals. Both parties are to act in their proper spheres, and both with openness and sincerity. [*346]

Cadwalader, for the plaintiff, stated the question to be in substance the same as was decided on a similar policy, in the Columbian Ins. Co. *v.* Lawrence, 2 Peters, 25, 39, 55, 56, on which authority he relied to show that the testimony was admissible, as tending to negative the possibility of the alleged misdescription having affected the rate of premium, which was the sole criterion on such a policy as this, to determine the materiality of the misdescription complained of. He cited other cases to the same effect.

He also contended, that it was competent evidence of an admission by the defendants, that the description in the policy was in fact correct.

He then stated, that if the case turned upon the doctrines

peculiar to Pennsylvania, as to admitting parol evidence of matters occurring at the time of making a written contract, these doctrines were perfectly well established, and their applicability to the case was beyond dispute.

Lastly, that as the secretary of the insurers by consent of both parties, acted as the scrivener or draftsman of the order and policy of insurance, the evidence was competent, as tending to show that the mistake complained of was one for which the defendants were alone the party to blame, and who ought to suffer; and one in which chancery would interpose to amend and rectify the policy.

Afterwards the court directed a second argument of the case, which being reached on the last day of the session, the defendant's counsel stated, that there was not time for the argument during the remaining period of the session. The plaintiff's counsel insisting that the case should be disposed of, the court ordered that the counsel should furnish written arguments. To this the defendant's counsel objected, but the court held, that though they would not make a compulsory order of this sort, in a case which had never been argued, yet that rearguments were directed for the satisfaction of the court alone, and were altogether subject to their discretionary control and direction.

The court ordered that the counsel for the defendants submit to Judge Sergeant a written argument on their part within sixty days, in default of which the rule to be discharged, and judgment to be entered on the verdict on the first day of the succeeding term.

A written argument in substance as above set forth was furnished by the defendants' counsel within the period limited.

The opinion of the court was delivered by

SERGEANT, J.—A mistake in a policy may be rectified, when it clearly appears from the label or other satisfactory [*347] evidence that it *was reduced to writing in terms not conformable to the real intention of the parties. Motteux v. London Ass. Co., 1 Atk. 545; Henckle v. Royal Exch. Ass. Co., 1 Ves. 317. I see no reason why the same

thing may not be done in the present instance, by correcting the policy according to the verbal description furnished to the secretary, if the evidence shows that he omitted a material part of that description. The memorandum, which has been termed the order, possesses no greater efficacy than the policy, and may itself be corrected in the same manner. It is immaterial whose act it was; it is sufficient if the evidence shows, that it did not conform to the intentions of the parties, whether by the mistake, or inadvertence of the person who drew it up. It may be remarked, however, that by the conditions annexed to the policy, the secretary is designated as the person to whom the description is to be furnished. If he, acting in this capacity, undertakes to reduce the verbal particulars to writing, and file them as a memorandum or order, the insured has a right to expect he will insert all that is material; and if he omits to do so, I should deem it his act, and not the act of the insured, and that the company would, in equity, be precluded from setting up this omission, as an objection to a recovery in case of loss, in the same manner as where the policy is not made conformably to the order. The evidence to support such an allegation, ought to be clear and satisfactory. But of that, the jury were to judge. I am of opinion that the evidence was properly received, and that the rule to show cause why a new trial should not be had, be discharged.

Rule discharged.*

Cited by Counsel, 2 Wh. 172; 5 Wh. 107; 5 W. & S. 121; 3 Barr, 254; 5 Barr, 406; 11 H. 55; 14 Wr. 338; 9 S. 329.

Commented on by the Court in 7 W. & S. 352.

Cited by the Court, 2 Wh. 79.

*Judgment in this case was entered in July Term, 1834.

[*348] *Smith *against* Moore.

APPEAL.

The number on the corner tree under the provisions of the act of the 24th March, 1785, directing the mode of distributing the donation lands, controls the boundaries in the general draft in locating the patent.

THIS was an ejectment for a tract of land situated in French Creek township, *Mercer* county, containing two hundred acres or thereabouts, bounded by lands of Robert Cochran, on the south, Hugh Moore and Samuel Evans, on the west, by land of Isaac Woodworth, and on the north by land on which Robert Jones resides.

It was tried in the Circuit Court before Mr. Justice Smith, and verdict for the plaintiff.

The defendant's counsel moved the court for a new trial—which was refused; from which decision the defendant appealed to the Supreme Court.

The defendant's counsel requested the court to charge the jury—

1st. That the patent is the plaintiff's title.

2d. That his title, if any, is for the land called for in the patent—and must be so far conformed to it as to apply substantially to the land therein described.

3d. That if the land claimed is substantially that given in the patent, the work on the ground, as to the length of lines, course, &c., is to govern and control: but the land must be that intended in the patent.

4th. That an entirely different tract from that described and intended in the patent, cannot be recovered under that patent.

5th. That the general draft is to decide as to the general relative situation of one tract to another.

6th. That if the plaintiff's survey was made by mistake, or otherwise, on a place entirely different from that called for in his patent—and such survey not returned into office, he cannot recover.

The answers of the court to these points were as follows, viz.:

Answer to the first point.—The patent is evidence of the

plaintiff's title, but not the only evidence, and in the location of the patent, regard is to be had to the marks on the ground.

Answer to the second.—That the plaintiff's title under the patent is for the tract granted by the patent, and whether the land claimed *in this ejectment is that granted by the patent, is a fact to be decided by the jury from all the evidence given here on the trial. [*349]

Answer to the third.—If the land claimed by the plaintiff is that granted by the patent given in evidence, and under which he claims, the marks on the ground are to govern as to courses and distances, and the tract of land must be the same tract drawn and patented.

Answer to the fourth.—The plaintiff in this suit cannot recover an entirely different tract from that drawn and patented to John M'Ginnis—but a variation of the courses and distances and boundaries as called for in the patent, from the marks on the ground, will not defeat the plaintiff's title, provided the jury are satisfied from the evidence given on the trial, that the land claimed is the same drawn by and patented to John M'Ginnis.

Answer to the fifth.—That the general draft is *prima facia* evidence as to the general relative situation of one tract to another as a general principle—but when the marks on the ground differ from the general draft, the marks on the ground are the true survey; and here it will be observed, that as to the land in dispute, it is admitted by both parties that the general draft is correct.

Answer to the sixth.—If the survey under which the plaintiff claims was made by mistake or otherwise on a place entirely different from that called for in the patent, and that survey not returned into the office, he could not recover under the patent, land entirely different from that granted by the patent; but when the survey was made, and whether on the ground in dispute or not, is a matter to be determined by the jury from the evidence given on the trial.

The court charged further upon points submitted by the plaintiff's counsel. 1. That the numbered corner is to control in the locating of the patent. 2. That the declarations of

John Martin were to weigh with the jury lighter than a feather.

Reasons assigned by defendant's counsel for a new trial.

1st. The charge of the court upon the law was erroneous.

2d. The verdict of the jury was against the weight of the evidence.

3d. The verdict was against both the law and evidence of the case.

4th. The verdict locates the land of the plaintiff in a place entirely different from that described in the patent—or in the survey.

It was argued before all the judges by *Selden* and *Wallace* for the appellant, who referred to 4 Serg. & Rawle, 462.

Banks and *Baldwin*, *contra*, who cited 2 Smith, 62; Ib. 290; 4 Dall. L. 684; 2 Binn. 109; 14 Serg. & Rawle, 388; 5 Binn. 207; Pamphl. L. 1818, 274; 11 Serg. & Rawle, 448; 3 Dall. 486–7.

[*350] *The opinion of the court (Tod, J., and Huston, J., dissenting), was delivered by

GIBSON, C. J.—The legislature undoubtedly contemplated a survey in rectangular figures, because the surveyors were required to mark the number of each lot on the northwestern corner tree of the survey; a direction which could not well have been executed, had not the lots been laid off in squares or parallelograms corresponding in a degree to the cardinal points of the compass. The lots consequently being alike as regards course, distance, and superficial content; and there being neither warrant nor owner, as in ordinary cases, to answer the purposes of designation, the whole being surveyed together with a view to distribution after the surveys should be returned and connected in a general draft; it was necessary to have the individual lots distinguished by names or numbers either written on the general draft or marked on objects permanently attached to the lots themselves. The legislature thought proper not to chose between those two methods, but to adopt both; and accordingly the number was directed to be

marked on the general draft to serve as a register of the drawing and patenting, and also on a particular corner tree, to identify the subject of the grant. Thus, in the twelfth section of the act of 1785, by which the proceedings were directed, it was provided, that "when a sufficient number of lots shall be surveyed and returned to the surveyor-general, he shall cause a draft to be laid down of the whole, noting on each the number thereof; which shall be kept by the Supreme Executive Council till all the applications agreeable to this act shall have been satisfied; and afterwards shall be safely deposited in the office of the master of the rolls, as a public record to serve, to all intents and purposes in lieu of recording the patents." And by the thirteenth section "the Supreme Executive Council shall insert in the general draft and within each lot, the name and rank of the person for whom it was drawn." Thus the office to be performed by the general draft is explicitly told. Then by the tenth section: "In running the boundary lines of the lots, the surveyors, respectively, shall cause the same to be well defined by marking the trees on the lines at small distances, and particularly the angles and corners; and on the northwestern corner trees, shall be marked in Roman figures, the number of the lot; and if the said corner should be a post, then the said number to be marked on a tree in said lot most contiguous thereto." And from this the office of the numbered corner tree, is equally apparent. The general draft constitutes no part of the title; and so far were the legislature from meaning to permit it to control the work on the ground, that it was not even evidence of the relative situation of the lots till it was made so by the supplementary act of the 24th of March, 1818; and even then only when the original marks on the ground should not be found. In the order *of executing the work directed by the original act, the number was to be marked on the corner tree at [*351] the time of running and marking the lines; and, of course, before the drafting of the survey for return. It could not well be marked afterwards, because in making separate returns of each particular survey, the officer would be unable to designate the adjoining lots unless they should already have

received their badge of individuality. The general draft was to be still subsequent to the returns. If, then, at the time of making the survey on the ground, the lot received a name of baptism sufficient to distinguish it from all the rest, its individuality could not be destroyed or its name changed by a blunder in the return in respect of the boundaries. Where there is a discrepance between the numbered corner and the boundaries returned, it appears more reasonable that the number should be taken to determine the boundaries, than that the boundaries should be taken to determine the number, which was employed originally to designate the particular lot for no other reason than because the boundaries were inadequate to the task. What certainty of result would there be in locating the particular lot on the spot indicated by the boundaries called for in the return? Many of the numbers called for as adjoining, may be in the predicament of the numbered corner of the lot to be identified, and require previous identification themselves: so that if we once get away from the numbers on the ground, we shall be at sea without star or compass, and with nothing but a chart which is admitted on all hands to be inaccurate. Besides, in a very few instances would all the calls in the return be satisfied by any possible juxtaposition; and when but one, or at most two, of the adjoining numbers or trees required, can be made to correspond with the return, what is to be done? By the eleventh section, the surveyor-general was required to "give such instructions to his several deputies concerning the numbering of the classes of lots respectively, as that they may succeed each other in numerical order;" and hence it is supposed, that by a numerical process on the general draft, the true place of each number may be perfectly ascertained. That would give to the general draft an importance which I think has been shown the legislature never intended it to have. But having thus fixed the place of the particular number, what if the adjoining numbers should still not happen to correspond with the calls in the return of its survey? Nothing would be gained by the process, the difficulty to be overcome recurring in as great force as ever. That the numerical order of suc-

cession was not always observed, either on the ground or in constructing the general draft, is notorious, and hence the frequency of disputes in locating the patent: so that a discrepance between the return of survey and the work on the ground, would occur just as frequently after having determined the location in this way, as if it were determined by the numerals on the corner trees. Besides, to correct a blunder committed at an early *stage of the work, would require the numbers of all the subsequent surveys to be [*352] shifted; and thus would be produced a scene of mischief and confusion unparalleled in countries where actual landmarks are regarded. Perhaps in none of the districts, is there a lot, which, having its relative situation thus determined, would correspond with the adjoining numbers as they exist on the ground. The field work would therefore go for absolutely nothing; and all the subsequent work would have to be unravelled in consequence of a single error in the order of succession. This would be ruinous to those who have entered and made improvements according to the numbers as they appear in most instances, not only on the ground, but on the general draft. In the supplementary act of 1818, it is taken for granted that the marks on the ground are to govern. The truth is, this particular part of the original act was merely directory; for it surely never was designed that such a blunder should be fatal to perhaps more than a majority of the surveys. What is the particular difficulty here? It is that if we go by the numbered corner, the trees and adjoining numbers on the ground will not correspond with the return of survey. It is a familiar principle of our system, and one that, in reason, is as applicable to this species of title as any other, that it is the work on the ground and not the diagram returned, which constitutes the survey, the latter being but evidence (and by no means conclusive) of the former. It would be strange, therefore, if a blunder in the return might not be rectified in this instance as in any other, by the work on the ground. It is conceded that the patent may be rectified by the return of survey: and why not the return by the lines on the ground, and particularly the numbered corner tree which is the foundation

of the whole? If different corner trees should happen to bear the same number, the returns of survey might be consulted; but surely not where we may go to the source; and for this plain reason, that the return cannot be as satisfactory evidence of the number, as the number itself.

In regard to the argument that the patent passes nothing but what is included in the metes and bounds set out, it is sufficient to remark, that although the prescribed form of the patent requires the bounds to be inserted, yet this is merely for the purpose of description and not to restrict the operation of the instrument. A grant by name or number, where the boundaries have been previously ascertained, passes the whole; and even where the subject-matter is erroneously described, the variance is immaterial where the particular tract can be identified: as in Stewart *v.* Shoenfelt, 13 Serg. & Rawle, 360, where the land was found to lie in a different township, and Grant *v.* Eddy, 2 Yeates, 148, where it lay in a different county. The objection would equally hold in respect of any other species of title, where the landmarks should include more than the bounds set forth. Were it to prevail here, the soldier would be deprived of the *reward of his services altogether. [*353] He could not obtain the lot corresponding to the number drawn by him, because it would not be included in the bounds of his patent; and he could not hold the lot actually included, because, not having drawn it, the patent would be void for excess of authority.

The direction of the judge, that the number of the corner tree controls everything, was therefore an accurate exposition of the law. In arriving at this conclusion it weighs much, that it coincides with the opinion which has been uniformly held in this part of the state by the bench and by the bar, and acted upon by the people. Whatever, therefore, might be the propriety of it on abstract grounds, it has acquired much of the inviolability of a rule of property, and ought not now to be disturbed. Judgment affirmed.*

Cited by Counsel, 9 W. 116; 6 W. & S. 52, 476; 6 S. 41; 7 N. 256.
Cited by the Court, 10 Wr. 484; 1 S. 492.

* The opinion in this case was delivered at Pittsburgh, October 3, 1829.

RULES

OF

THE SUPREME COURT

I. *Appeals from the Orphans' Courts.*

On all appeals from the decrees of Orphans' Courts, on the settlement of accounts of the executors, administrators, or guardians, the appellants shall, before the end of the first week of the term to which the appeal is entered, file with the prothonotary of this court, a specification in writing of the items to which they except; and on failure to do so the appeal may be dismissed.

II. *Arbitration and Awards.*

Sec. 1. If arbitrators are not appointed at the time specified in the rule, the prothonotary shall strike off the rule; unless the parties otherwise agree.

Sec. 2. Exceptions to an award of arbitrators must be filed within twenty days after the award is filed; and must be accompanied with an affidavit as to facts, not appearing on the face of the proceedings.

Sec. 3. In cases of an appeal from an award, if within the twenty days allowed by the act, sureties shall be entered which the appellee shall deem insufficient, he may within four days after the expiration of the twenty days, give notice in writing to the appellant, or his attorney, that he excepts to the same; whereupon the appellant shall, within eight days after said notice, justify the bail in open court, or before the prothonotary, or one of the judges, giving the appellee or his attorney two days' notice in writing, of the time and place of such justifica-

tion; in default whereof, the sureties shall be deemed insufficient, and the appeal be dismissed.

[*356] *III. *Arguments.*

Sec. 1. On motions or rules to show cause, the testimony of witnesses, if necessary, shall be taken by depositions in writing, before a judge, justice of the peace, alderman, or examiner appointed by the court, on reasonable notice in writing; and no witnesses shall be examined at the bar, but by a special order of the court.

Sec. 2. On all law arguments or demurrers, reserved points, special verdicts, motions in arrest of judgment, cases stated for the opinion of the court, rules to show cause, why new trials shall not be granted, and exceptions to the report of referees or awards of arbitrators, the attorneys for the respective parties, shall each deliver a paper-book, setting forth the substance of the case, and the points to be discussed, to each of the judges, previous to the argument.

Sec. 3. In the argument list, priority shall be given to writs of *certiorari*, removing indictments or inquisitions of forcible entry, &c., and proceedings under the landlord and tenant act; and other cases that require *festinum remedium*, provided the priority be asked within the first four days of the term.

IV. *Attachments.*

Sec. 1. No order shall be made for the sale of property seized on a foreign attachment, unless the plaintiff or some other person acquainted with the circumstances shall make affidavit that the debt or demand is just; and unless it be made to appear to the court, that the property attached is of a perishable nature, or that from other causes, it would be conducive to justice, that it should be converted into money; and the court will make special order for the temporary disposition of the proceeds by investment or otherwise.

Sec. 2. No special bail shall be taken to dissolve the attachment, without notice of at least twenty-four hours, specifying particularly the names, places of abode, and calling of the persons to be offered as bail.

Sec. 3. At any time after the return of a *scire facias* against

the *garnishee*, the plaintiff may file interrogatories in the prothonotary's office, and enter a rule there, of course, for the garnishee to answer on or before a day to be named, not less than twenty days from the time of serving a notice of the rule and a copy of the interrogatories. If the plaintiff obtain a judgment against the garnishee, for a greater sum than the answers to the interrogatories admitted to be in his hands, the garnishee shall pay the costs.

*V. *Attorney and Counsel.* [*357]

Sec. 1. No person shall be admitted to practice as an attorney or counsellor in this court, unless he hath served a regular clerkship within the state to some practising attorney, or gentleman of the law, of known abilities, for the term of four years, and afterwards shall have practised as an attorney in one of the County Courts of Common Pleas, or District Courts, for the term of one year; or served such clerkship three years, and practised two years.

Provided always, that in the case of a person applying to be admitted, who shall appear to have studied the law with assiduity, under the direction of some practising attorney, or gentleman of the law of this state, for the term of two years, after his arrival at the age of twenty-one years, and afterwards practised in some one of the County Courts of Common Pleas, or District Courts for the term of two years, he may be admitted.

Sec. 2. No person shall be admitted to practise as an attorney of this court, upon the ground that he has been admitted to practise in the courts of some other state, unless he be a citizen of the United States; and also, unless it be shown that the attorneys of this court are entitled by the practice of the court where the applicant has been admitted, to admission under the like circumstances.

Sec. 3. All the agreements of attorneys touching the business of the court shall be in writing, otherwise they will be considered of no validity.

Sec. 4. No attorney of this or any other court, or sheriff's officer, bailiff or other person concerned in the execution of process shall become special bail, surety in a replevin bond, or

for the stay of execution, or bail on an appeal or in error, except by special leave of the court previously obtained.

Sec. 5. Where three or more counsel are concerned on one side, in the trial of a cause, one of the counsel maintaining the affirmative of the issue, shall open the case, state the facts, and if necessary the principles of law involved, call and examine the witnesses, and read the papers; one of the opposite counsel shall then open his case and proceed in like manner. When the whole evidence is closed, one of the counsel on the affirmative side shall sum up, going fully into the points in controversy, and citing all the authorities which he and his colleagues intend to rely upon. The two opposite counsel shall then speak in succession. One counsel on the affirmative side shall then be heard in reply; confining himself to the points made by the opposite counsel, and to the enforcing those made by his colleague. When two counsel only are concerned on a side, the same course shall be pursued as nearly as may be.

Sec. 6. No cause on the calendar shall be left open on account of the engagements or absence of counsel, unless the engage-
[*358] ment be on *public duty, or the absence arise from sickness. Where two counsel are concerned on the same side, the absence of one of them shall under no circumstances be a reason for leaving open a cause.

Sec. 7. Upon rules to show cause of action, or to dissolve foreign attachments, the counsel who is to show cause will begin and conclude: in all other cases, the counsel who obtains the rule to show cause is to begin and conclude.

VI. *Bail.*

Sec. 1. When attorneys issue writs of *capias* against defendants from whom they do not require bail, they will mark their precepts with the words "no bail required," which the prothonotary must indorse upon the writ; in which case the sheriff or his officer is to serve the defendant with a copy of the writ, as in cases of summons; and the defendant on such service must subscribe a note with these or the like words: "I hereby empower the prothonotary to enter my appearance to this action," which subscription is to be attested by the officer who serves the writ; and in all cases where

common bail is ordered by a judge, the like note to the prothonotary must be subscribed, and attested by the officer.

Sec. 2. No bail shall be required in any action during the absence of all the judges of this court from the county of Philadelphia, without a previous affidavit of the cause of action, made and filed before the issuing of the writ, together with the certificate of a judge of the District Court for the city and county of Philadelphia, that he thinks the same sufficient.

Sec. 3. Upon the arrest of a defendant on a *capias ad respondendum*, or on the service of a notice to enter special bail, a citation will be issued by a single judge. Rules to show cause of action, and why the defendant should not be discharged on common bail, may be moved for after the return day, and within the first week of the term. Under special circumstances, however, such rules may be granted after the first week.

Sec. 4. No bail shall be required in actions of trespass *vi et armis*, for libels and slanderous words, conspiracy, false imprisonment, or malicious prosecution, unless an affidavit of the cause of action be filed before the writ is issued.

Sec. 5. When a positive affidavit of a real subsisting debt shall be made by the plaintiff or any other person whose knowledge of the circumstances and situation with regard to them shall enable him to make it, no counter affidavit shall be admitted; but the judge will at his discretion ask such further questions of the deponent as may satisfy his conscience with regard both to the cause of action and the quantum of bail.

*Sec. 6. When an affidavit is not positive, but yet sufficient to convince the judge that there exists a good cause of action, especially where it is founded on a bond, note, bill, letter, or other paper signed by the defendant, the judge may at his discretion hold the defendant to bail; and if expedient, counter affidavits may be admitted; provided that the merits of the controversy be not farther inquired into than may be absolutely necessary to decide the question of bail. [*359]

Sec. 7. Where the plaintiff is absent, the affidavit to hold

to bail may be made before a lawful magistrate or public officer, agreeably to the custom of the country where it is made, and certified under some known and public seal, or before a consul or vice-consul of the United States; and upon such affidavit the judge may at his discretion hold the defendant to bail.

Sec. 8. Supplemental affidavits may be heard at the discretion of the judge.

Sec. 9. The defendants shall have four weeks from the first day of the term to which the writ is returnable to enter special bail; and if not then entered, the bail bond may be sued. But if before the expiration of four weeks special bail *de bene esse* shall be entered, of which the plaintiff shall not approve, he may within ten days after the expiration of the four weeks, give notice to the defendant or his attorney that he excepts to such bail; whereupon the defendant shall within eight days after such notice justify the bail before the prothonotary; giving the plaintiff or his attorney twenty-four hours notice of the time and place of such justification. If no special bail shall be entered within the said four weeks, but shall be entered before the commencement of the succeeding term: the plaintiff shall within the first four days of that term make his exceptions to the sufficiency of the bail, or it shall stand. But in no case whatever shall special bail be entered without twenty-four hours previous notice in writing, specifying particularly the name, place of abode, and calling of the bail.

Sec. 10. No suit shall be commenced on a bail bond without twenty-four hours notice to the defendant's attorney, if there be any appearance entered.

Sec. 11. Bail sued by *scire facias* or in debt on recognizance may surrender the principal at any time before or within eight days after the first day of the term to which the process served is returnable; and when the surrender is made after process is issued against the bail, they shall pay all the costs of the suit against them.

Sec. 12. Exception may be taken to the sufficiency of security to stay execution within four days after the expiration of thirty days from the entry of the judgment; and the defendant within eight days after notice of exception shall

justify the security before the *prothonotary, giving twenty-four hours notice of justification, subject to appeal to a judge. [*360]

Sec. 13. After taking an assignment of a bail bond a plaintiff shall not be entitled to a rule to bring in the body of the defendant; but he may except to the sufficiency as special bail of the sureties in the bail bond.

Sec. 14. Recognizances of bail in error shall be plainly drawn and engrossed on parchment or paper in the following form, or as near as may be.

County, to wit:

"You severally acknowledge to owe (the plaintiff in the "action) the sum of (double the sum recorded) upon condition "that A. B. prosecute his writ of error with effect, and if judg- "ment be affirmed, that he satisfy and pay the debt, damages, "and costs recovered, together with such costs as shall be "awarded by occasion of delay of execution, or else you will "do it for him."

Sec. 15. The plaintiff's attorney may within twenty days after notice of the taking of the bail in error, except to the sufficiency thereof, when the defendant must either put in new bail or the old bail must justify within ten days after exception taken, in default whereof the prothonotary of this court shall *non pros.* such writ of error.

VII. *Bill of Particulars.*

At any time after the entry of an appearance to a summons, or of special bail, justified or not excepted to, the defendant may call for a bill of particulars, and until it be furnished, proceedings shall stay. Should the plaintiff not comply for three months, a non-suit may be entered by the prothonotary on due notice of ten days.

VIII. *Calendar.*

Sec. 1. All causes at issue before the first day of the term for which the list of the trials shall be made out, shall be placed by the prothonotary on the calendar, unless otherwise directed by the parties. But no cause shall be placed on the calendar on which issue is not actually joined; and no cause

shall be transferred from one period to another, without the special order of the court.

Sec. 2. All actions at issue either in fact or law left off the calendar for one year, shall be marked by the prothonotary "discontinued."

[*361] *Sec. 3. When issues are joined both in fact and law, the latter shall be first disposed of, unless otherwise directed by the court: and in the meantime the cause shall be placed only on the argument list.

Sec. 4. If an issue be formed substantially by the pleadings, the cause shall be considered to every purpose at issue, without a formal joinder, which may be entered by the prothonotary, or supplied, if desired, at any time.

Sec. 5. No jury list shall be sent by the prothonotary, except in those cases which have been directed for trial by special jury. In these cases a list of jurors shall be delivered to the attorney on each side at least eight days before the time appointed for striking, with a notice of the time and place of striking. Either party may strike *ex parte* at the time appointed, without further notice; and either party may omit to strike altogether, or may strike any number not exceeding twelve; and the jury shall be called by ballot from the names which remain upon the list. No jury list shall be struck at the bar.

Sec. 6. If the commonwealth is not interested in the event of a suit, such cause shall not be entitled to a priority in the trial of other actions, although the name of the commonwealth may be used as a party thereto.

IX. *Certiorari.*

On the return of any *certiorari* for the removal of any order, judgment, or proceedings, in relation to a public or private road, this court will not suffer the merits of the case to be entered into, nor reverse the order of the sessions, unless for some irregularity apparent on the record, or that the court below have exceeded their jurisdiction, or have erred in their judgment in point of law, or unless due proof be made of fraud or undue practice in the viewers or parties, which the party complaining of such fraud or undue practice had not neglected to make appear to the court below.

X. *Costs.*

Sec. 1. In cases where the plaintiffs reside out of the state, in *qui tam* actions, in suits on administration or office bonds, or where the plaintiff after suit brought has been discharged under the insolvent law, the defendant on motion and affidavit of a just defence against the whole demand, may have a rule for security for costs; and for want of such security at a time named by the court, judgment of non-suit will be entered on motion.

*Sec. 2. Where the payment of costs is prescribed as a condition for the continuance of a cause, the continuance shall not be entered until the costs are actually paid. [*362]

Sec. 3. All bills of costs shall be taxed in the first instance (if taxation be required) by the prothonotary, subject to an appeal to a judge.

XI. *Depositions.*

Sec. 1. Rules to take the depositions of witnesses within the state at a greater distance than forty miles, may be entered of course, and the depositions may be taken before any person legally authorized to administer oaths or affirmations, on fifteen days' notice.

Sec. 2. Rules may be entered of course, to take the depositions of ancient, infirm, or going witnesses, on forty-eight hours' notice, within the city or county of Philadelphia, and on four days' notice out of the city and county of Philadelphia, and within forty miles of the city.

Sec. 3. Rules for a commission to take testimony out of the state may be entered of course, and the commission may be issued after fifteen days' notice, containing the commissioners' names and a copy of the interrogatories filed.

Sec. 4. No rule to take depositions (except in the case of ancient, infirm, or going witnesses, or for a commission) shall be entered by the plaintiff until a declaration be filed, and a bill of particulars furnished (in cases where it is necessary); or by the defendant until he has entered special bail in suits commenced by *capias*, or an appearance in suits commenced by summons.

Sec. 5. No deposition of a witness resident in Pennsylvania, within forty miles of the city of Philadelphia, can be read in evidence, unless the party offering it satisfy the court that a subpœna has been taken out and served, or that after taking out a subpœna and reasonable inquiry, the witness could not be found, or that he is at the time of trial not within the state.

Sec. 6. The prothonotary shall give notice to the respective attorneys of the return of a commission, and neither party shall be allowed to take exception to the form of the execution or return, unless within fifteen days after notice of the return, he apprise the opposite counsel of his intention to do so.

Sec. 7. The actual expenses of executing a commission, including postage and of taking depositions before an examiner, or commissioner appointed by the court, shall be allowed in the costs, provided they do not exceed the sum of one hundred dollars in any case.

[*363] *XII. *Errors and Appeals.**

Sec. 1. In all cases brought into this court by writ of error, the counsel for the plaintiff in error shall, on or before the third day of the term to which the writ is returnable, specify in writing the particular errors which he assigns, and file them in the prothonotary's office; and on failure so to do, the court may *non pros.* the writ; and on or before the argument of the cause he shall deliver to each of the judges a paper-book, containing a statement of the case, and a copy of the said specification. If he omit to do it, the court may *non pros.* the writ.

---

* *Act of* 1829 *and* '30.

Sec. 1. That from and after the 1st day of July, 1830, the officers hereinafter mentioned within this commonwealth, are hereby authorized to demand and receive, in addition to the fees heretofore required by law, the following sums for and on account of the commonwealth, which shall be paid by the parties applying for the process or services mentioned, and which sum shall be taxed in the bill of costs, to abide the event of the suit, and be paid by the losing party: The prothonotary of the Supreme Court, exercising appellate jurisdiction, shall demand and receive on every writ of error issued or appeal entered by him, the sum of three dollars and fifty cents.

Sec. 2. In all cases of appeal from the Orphans' Court the paper-books and specifications of exceptions shall be delivered on or before the argument by the counsel for the appellant: if he omit to do it, the appellee may furnish the books, in which case the court may refuse to hear the appellant.

Sec. 3. In all cases of *certiorari*, the counsel for the party prosecuting the writ shall file a specification, and deliver a paper-book as in the case of a writ of error, and under the same penalty for omission.

Sec. 4. No bills of exceptions, or opinions filed under the act of assembly, except references to documents, or depositions, will be considered as forming a part of the records, and no attention will be paid to references.

Sec. 5. No paper which shall not have been attached to the records by the court below, shall be considered part of the records, even by consent of the parties, nor shall it in any event be used as such, except when certified by the court below, in pursuance of a writ of *certiorari*.

XIII. *Incorporations.*

No charter of incorporation will be allowed by this court for any association in the city or county of Philadelphia, unless the same shall have been deposited with the prothonotary six days before the same shall be offered to the court; and it shall be the duty of the *prothonotary to post up a list of the charters offered within the court-room; and he [*364] shall keep a record of all charters allowed, in which shall be set forth the date of incorporation, and the name, style, or title of the company.

XIV. *Judgments.*

Sec. 1. In all cases of summons, (except ejectment and partition,) and in *scire facias*, the plaintiff may direct judgment to be entered by default, if there be no appearance for the defendant within the first week of the term to which the process is returned; provided (except in case of *scire facias*) the process was served ten days before the return day; and provided, (except in cases of *scire facias*,) a declaration be filed before the judgment.

Sec. 2. In all cases where rules have been taken, the neglect of which entitles a party to judgment, the prothonotary shall enter judgment on the application of such party, provided an affidavit be filed of the due service of a notice of such rule.

Sec. 3. The prothonotary shall ascertain the damages in all cases of judgment by default, where the suit is brought on a promissory note, bill of exchange, or book account. He shall also ascertain the damages in all other cases founded on contract, and sounding in damages where the defendant does not object. But if the defendant object in these last-mentioned cases, or if the action be founded on a tort, the damage shall be ascertained by a jury of inquiry. Notice shall always be given at least four days of the execution of a writ of inquiry of damages.

Sec. 4. No judgment shall be entered on a verdict in any civil case, without the special order of the court, until the sum of four dollars be paid by the party for whom the verdict shall have been given.

Sec. 5. If a warrant of attorney to enter judgment be above ten years old, and less than twenty, application must be made to a judge for leave to enter judgment, founded on an affidavit of the due execution of the warrant, and that the money is unpaid, and the defendant living. If the warrant of attorney be above twenty years old, a rule to show cause must be obtained, of which notice must be given, if the defendant be within the state of Pennsylvania.

Sec. 6. In order to entitle a party to ask judgment under the act of assembly, on failure to produce books or writings, an order of the court must be obtained upon the return of a rule to show cause, previously to the trial.

[*365] *XV. *Letters Rogatory.*

Letters rogatory may issue on application of either party to take the depositions in any cause depending in this court: which letters rogatory shall be in the form following, viz.:

"The Supreme Court of Pennsylvania,

"To any judge or tribunal having jurisdiction of civil causes at

"Whereas a certain suit is pending before us, in which A. B. is plaintiff and C. D. is defendant, and it has been suggested to us, that there are witnesses residing within your jurisdiction, without whose testimony justice cannot completely be done between the said parties; we therefore request you that, in furtherance of justice, you will, by the proper and usual process of your court, cause such witness or witnesses as shall be named or pointed out to you, by the said parties or either of them, to appear before you, or some competent person by you for that purpose to be appointed and authorized, at a precise time and place by you to be fixed, and there to answer on their oaths and affirmations to the several interrogatories hereunto annexed; and that you will cause their depositions to be committed to writing, and returned to us under cover duly closed and sealed up, together with these presents: and we shall be ready and willing to do the same for you in a similar case when required. Witness, &c."

XVI. *Money paid into Court.*

Sec. 1. A defendant may, upon motion and before he pleads, pay into the court the amount which he admits to be due, together with costs up to that time. The plaintiff may receive the amount so paid, and either enter a discontinuance or proceed to trial at his option. But in the latter case he shall pay all costs subsequently accruing, unless he recover judgment for a sum independently of that so admitted to be due and paid into court.

Sec. 2. Upon the payment of any money into court to abide the order of the court, the same shall be deposited in such incorporated bank as the court may designate, to the credit of the court in the particular cause, and shall be drawn out only upon an order of the court, attested by the prothonotary. Provided, that nothing herein shall be construed to prevent a disposition of the money by agreement of the parties. A copy of the rule will be inserted in the bank-book in which the deposits are inscribed.

*Sec. 3. The prothonotary shall receive for all sums of money paid into the court from the party paying in the same, at the rate of one per cent. on an amount not exceed- [*366]

ing three hundred dollars, of one-half per cent. on an amount not exceeding one thousand dollars, and of one-quarter of one per cent. on sums exceeding that amount.

Sec. 4. On the second Monday of each term of this court, and on the return day of July in each year, the prothonotary shall exhibit to the court an account of all moneys paid into the court, and also his bank-book containing his account with the bank in which such moneys are deposited, settled up to the time when it is exhibited.

NOTE.—The bank of Pennsylvania has been designated for deposits according to the above rule.

XVII. *Motion Days.*

Mondays and Thursdays of each week of the term shall be regular days for the hearing of motions and disposing of rules not on the argument list.

XVIII. *New Trials and Arrest of Judgment.*

Sec. 1. No motion shall be made for a new trial after a motion in arrest of judgment.

Sec 2. All motions for new trials or in arrests of judgment shall be made within the first four days of the term; but no such motion shall even then be received, unless notice in writing of such intended motion hath first been given to the adverse party or his attorney ten days before the term.

Sec. 3. On all motions for new trials, the party making the motion shall within two days afterwards, if the judge who tried the cause shall require it at the time of entering the verdict, present a statement of the facts to the adverse party, and if he does not object to it, the same shall be signed by the respective parties and presented to the judge who tried the cause; and after being settled by him, a copy shall be given to each of the judges: If the opposite party object to it, he shall within two days state his objections to the party making the motion, and if the objections are not agreed to, the statement and objections shall be delivered to the judge before whom the cause was tried, who shall thereupon settle the case, and copies of the case as settled shall be delivered as above.

Sec. 4. In all cases of motions for a new trial or of verdicts

subject to the opinion of the court, the court may, on the report of the judge before whom the cause was tried, order judgment to be entered for the plaintiff to stand as security.

"And the reasons therefor in writing shall be then filed in the prothonotary's office." [Adopted 17th January, 1829.]

*XIX. *Notices.* [*367]

Sec. 1. All notices shall be in writing.

Sec. 2. If a party entitled to notice has not employed an attorney, it shall be sufficient to serve a copy on the party or his bail to the sheriff, or special bail if there be any; but if an attorney be employed and marked on the record, all notices, pleadings, and papers shall be served on him, except where an act of assembly directs otherwise.

XX. *Pleadings.*

Sec. 1. Rules to declare and plead, and for other pleadings, may be entered of course with the prothonotary at any time after the first day of the term to which the process is returnable: but the defendant shall not be entitled to enter any such rule until an appearance is recorded for him, and special bail entered in cases requiring it. On failure to comply with the rule after four weeks' notice, judgment by default or non-suit may be entered, subject, however, to any order of the court for opening, setting aside, or taking off the same. Either party may apply under special circumstances to a judge to enlarge the time, notice being given of such application.

Sec. 2. No dilatory plea shall be received unless supported by affidavit.

Sec. 3. When a defendant has pleaded the general issue with leave to give the special matter in evidence or to justify, he shall at least ten days before the trial, give notice of the special facts or matter on which he intends to rely, otherwise he shall be confined strictly to evidence admissible on a general issue plea.

Sec. 4. When there have been mutual dealings between a plaintiff and defendant, in order to enable the latter on the general issue to defalk his own account against the plaintiff's demand, or any part of it, he shall give notice at least ten days

before the trial, and at the same time furnish a copy of the account to be given in evidence. When a set-off is pleaded, it shall be fully and specially set forth in the plea, or in a notice to be given ten days before the trial.

Sec. 5. A defendant shall not be allowed, under the plea of payment to an action of debt, to give evidence that the bond or specialty was obtained by fraud, or a suggestion of falsehood or suppression of the truth, or without sufficient consideration; unless at least twenty days before the trial he give notice of the matter upon which he intends to rely.

[*368] *XXI. *Records.*

Sec. 1. No record of the court shall be withdrawn from the prothonotary's office without the special allowance of a judge, or the consent of the opposite counsel.

Sec. 2. In cases before arbitrators, however, the prothonotary may on the application of either counsel, deliver to him the pleadings, commissions, depositions, and other exhibits filed in the cause, taking his receipt to return the same to the office when an award is made or the case is otherwise terminated.

XXII. *Reports of Referees.*

Sec. 1. Exceptions to reports of referees shall be filed with an affidavit of the truth of the exception within four days after notice of filing the report, if it be made into office, and after it is read in open court if made into court.

Sec. 2. All reports made into court shall be read in open court on the first Saturday of the term.

XXIV. *Subpœna.*

No *subpœna duces tecum* for a public record or paper shall be issued without the special order of a judge.

XXV. *View.*

A jury of view shall be asked for on the first day of the period: Whereupon the jury shall be balloted for to try the cause, six of whom shall view the premises in the presence of an officer, before the trial.

Ordered by the Supreme Court, that all rules of this court heretofore adopted be, and they are hereby abolished, and that the foregoing be approved and adopted.

JOHN BANNISTER GIBSON,
MOLTON C. ROGERS,
CHARLES HUSTON,
JOHN TOD,
FREDERICK SMITH

Philadelphia, 28th March, 1828.

[*369] *OF WRITS OF ERROR.

The rules already made on the subject, not being, on experience, found effectual to expedite the decision of causes in this court, at March, 1833, the following rules are added:

In all cases of Writs of Error, to be issued hereafter, when the record is not returned on a writ of error, on or before the first return day of the second term after the teste of the writ of error, it shall be the duty of the prothonotary of this court to enter that the writ of error is *non-pros'd* according to rule of court, which *non-pros* shall not be taken off by consent of parties. July is not considered a term within this rule.

In all cases where a writ of error shall be pending in this court three years from teste of writ, and not continued for cause to a particular time, which time is not passed, the plaintiff in error shall be ready when the cause is next called for argument, and produce his paper-books, or the court will direct a *non-pros.*

And in cases which have been three years from teste of writ in this court, or which shall hereafter be there for three years, and not continued for cause, the plaintiff shall, in addition, give thirty days' notice before the expiration of the three years, to the adverse counsel, if any, or defendant in error, of his intention to argue the cause at next term; or on failure to do so, as well as to produce his paper-books, the court will direct a *non-pros,* which *non-pros* will not be taken off without consent of defendant in error in writing.

JOHN BANNISTER GIBSON,
MOLTON C. ROGERS,
CHARLES HUSTON,
JOHN KENNEDY,
THOMAS SERGEANT.

Philadelphia, 27th October, 1834.

LAW DEPARTMENT. AUG 18 1898 N.J.

INDEX.

[References are to the top paging.]

ACTION.

1. Popular actions are not criminal prosecutions, but civil suits. *Spicer* v. *Rees*, ... 122
2. A writ in debt is within the remedy prescribed by the act of 1729, by "bill, plaint, or information," to recover the penalty from a clergyman for marrying a minor without consent, &c. *Donahue* v. *Dougherty*, 124

ADVANCEMENT.

1. In an action by the grandchildren of an intestate against the administrator to recover a distributive share of the estate accruing to them in right of their parent, the defendant may set off a debt due by the parent of the plaintiffs to the intestate.
2. Therefore, where a promissory note has been given by the child to the parent, it is immaterial whether it is evidence of a debt, or is to be taken as an advancement, so far as respects its admissibility in evidence, in a suit brought by the grandchildren against the administrators of their grandparent, for a distributive share of the estate. *Earnest* v. *Earnest*, ... 213
3. The question of advancement may be settled in the Orphans' Court, but it must not necessarily be settled there.
4. Of advancements, under the laws of Pennsylvania, and the proper mode of ascertaining their amount and enforcing their operation, *Ibid.*

AFFIDAVITS.

Affidavits of jurors are inadmissible to inculpate their fellows or themselves. *White* v. *White*, ... 61

AMENDMENT.

See PRACTICE.

ASSIGNMENT, VOLUNTARY.

1. When more than one of several persons, liable to the payment of a note, have made voluntary assignments for the payment of their debts, the amount actually due on the note, at the times respectively, when dividends are declared, is to be taken as the sum on which the percentage is to be estimated. *Perit* v. *Pittfield*, ... 166
2. An assignment by partners of partnership effects for the benefit of creditors, contained a condition that the creditors should execute by a day certain, a release of their claims to their assignors individually and as co-partners. Both the partners had separate property. Held, that the assignment was fraudulent and void. *Thomas* v. *Jenks*, ... 221

ASSOCIATION.

1. An association for the purposes of mutual benevolence among its members only, is not an association for charitable uses. *Babb* v. *Reed*, 151
2. Its members, if not incorporated, are considered as partners in their relations to third persons, and the property of the association must be appropriated to pay the debts of creditors, not members of the association, before it can be applied to the payment of the claims of those who are members, ... *Ibid.*
3. A mechanic's lien, filed by a member of such an association against a building erected by it, is not avail-

able as against the liens of others not members, ... *Ibid.*

ATTORNEY.

1. An attorney-at-law holds his office during good behaviour, and is not professionally answerable for a scrutiny into the official conduct of the judges, which would not expose him to legal animadversion as a citizen. *Austin's Case*, ... 191
2. An assertion contained in a letter expressed in respectful language and addressed to a President Judge, by attorneys practising in his court, that the court had lost the confidence of the public and the suggestion of his retirement as the means of restoring it, do not affect the course of the judge's public duty, and cannot be deemed a breach of professional fidelity on the part of the attorneys, which will authorize the court to strike their names from the list of attorneys, ... *Ibid.*
3. Still less can they be so deemed, where the letter was in answer to one written to them by the judge, in which he had spoken to them of discipline relaxed, and disorder introduced in the conduct of business in court; of inadvertent remarks indicative of contempt for his decisions, and calculated to impress the public mind unfavourably to the court, and to himself as its organ; of giving place to a successor, who might obtain their confidence and co-operation, and in which he had, in conclusion, solicited an expression of their sentiments and determination as to the future. in relation to the grievances he had presented, . *Ibid.*
4. Nor is the character of the transaction altered by the publication of the correspondence in a public newspaper, by the attorneys, not for the purpose of assailing the reputation of the judge, but of defending their own, ... *Ibid.*

AUDITOR.

See AWARD.

AWARD.

See PRACTICE.

1. An award of referees, finding a certain sum to be due to the plaintiff, on a certain day between the date of the submission, and the time of finding the award, "exclusive of the outstanding debts on the books of C. E. (the defendant), arising from sales of the produce of Millville Furnace," is certain and final to a common intent, and therefore good. *Wood* v. *Earle*, . . . 44
2. Appeal from an award of arbitrators, cannot be made by executors who are sued on their own promise, though they are named as executors without their entering into a recognizance of bail. *Masterson* v. *Masterson*, ... 137
3. A writ of error to a judgment on an award of arbitrators, issued and delivered before the expiration of the time allowed for appeal, is improvident. *Robinson* v. *Bulkly*, 227
4. A defect in a recognizance on an appeal from an award of arbitrators, is waived by the appellee's omission to rule the appellant to amend it. *Walter* v. *Bechtol*, ... 228
5. The report of an auditor adjudicating upon facts, ought not to be set aside, except for plain mistake, which it is the business of the exceptant to establish by affirmative evidence where it is not self-evident in the report. *Harland's Accounts*, 323

BAILEE.

See CARRIER.

BARGAIN AND SALE.

1. The force and efficacy of a deed of bargain and sale. *Bennett* v. *Morris*, 16
2. A deed of bargain and sale, though by the express words of the statute, it has the force and effect of a feoffment and livery, for the purpose "of giving possession and seisin, and making good the title and assurance," is not equivalent in all respects to a feoffment and livery, and if executed by a lunatic or madman, it is void. *Desilver's Estate*, ... 111

BOUNDARIES.

See DONATION LANDS.

CARRIERS.

The proprietors of a stage coach were in the practice of carrying for hire, parcels of merchandise for persons generally: the parcel being entered in the way-bill.

Held, 1. That they were common carriers. Per Rogers, J. *Beckman* v. *Shouse*, ... 179
2. That they were not protected from responsibility for the loss of a parcel of goods, by an advertisement "all baggage at the risk of the owner;" the word baggage, not including merchandise generally, . . . *Ibid.*
3. In the absence of all proof of the manner of loss, the defendants would be liable as ordinary bailees for hire, *Ibid.*

CERTIORARI.

A certiorari does not lie to the Supreme Court from the decision of the Mayor of the city of Philadelphia, in an action brought to recover the penalty for a breach of the ordinance passed March 28th, 1822, relating to stalls in the market. *Spicer* v. *Rees*, ... 119

CHARGE.

When a legacy charged on land shall sink, or be raised, in the event of the death of the legatee before the period of payment. *Hodgson* v. *Gemmil*, ... 103

CHARITABLE USES.

An association for purposes of mutual benevolence among its members and their families, is not an association for charitable uses. *Babb* v. *Reed*, 151

CITIZENS.

See TREATY WITH SPAIN.

COMMISSIONERS.

1. Effect of the award of the commissioners under the treaty with Spain. *Yard* v. *Cramond*, ... 18
2. Of the power of county commissioners, to inquire into the irregularity of a ward election. *Comm.* v. *Commissioners*, ... 75

COMMISSIONS.

A commission of rather less than five per cent., allowed a guardian, the estate being large and attended with responsibility and labour. *Harland's Accounts*, ... 332

COMMON LAW.

Indictment at common law supplanted by specific remedy provided by act of assembly. *Hellings* v. *The Commonwealth*, ... 64

CONFLICT OF LAWS.

Local administrator entitled in preference to foreign executor. *Willing* v. *Perot*, ... 264

CONSIDERATION.

1. Evidence of a promise to pay in consideration that the plaintiff would wait, forbear, or give time, indefinitely or for a reasonable time at the instance and request of the defendant, will maintain an action against the promiser. *Downing* v. *Funk*, ... 69
2. A stipulation to pay on terms no more definite than waiting or forbearing for a time or giving time, or a longer time, will not entitle the plaintiff to recover, . . . *Ibid.*

CONSTABLE.

1. Of the powers of a constable as to adjoining ward elections. See *Comm.* v. *County Commissioners*, ... 75
2. His return not binding on the commissioners, ... *Ibid.*

CONTINGENT REMAINDER.

1. Testator devised to his daughter C. when she came of age, "to be hers during her natural life: and then to be her only heir during its life."

C. was the sole heir of the testator at his death.

Held, that the devise to C.'s heir was not void for uncertainty; that C. took an estate for life, with contingent remainder for life to the person who should be her heir,—heir being *designatio personæ:* and that the remainder was defeated by a bargain and sale in fee simple made by C. which united her estate for life, and reversion in fee, so as to make one entire estate in the vendee, incapable of afterwards opening so as to let in the contingent remainder. *Bennett* v. *Morris*, . . 9
2. Testator devised to his son A. a messuage to hold to him, during the term of his natural life; and if he should thereafter have issue of his

body lawfully begotten, then to hold to him, to his heirs and assigns forever; but in case he should die without leaving such issue, then to all the rest of testator's children, their heirs and assigns forever, as tenants in common. A. suffered a common recovery and had issue, who died during his life.

Held, that the ulterior limitation was a contingent remainder and not an executory devise, and was barred by the recovery. *Waddell* v. *Rattew*, 231

CONTRIBUTION.

An obligor to whom the bond has been delivered by the obligee on a promise of payment, actual or conditional, may, on actual payment in pursuance of his promise, maintain an action for contribution against his co-obligor. *Craig* v. *Craig*, . . . 91

COSTS.

1. On appeal by a defendant from the judgment of a justice, and award by arbitrators for a less sum, the defendant does not under the act of 1810, forfeit his right to recover his costs on the appeal from the plaintiff, by calling a witness after the plaintiff had closed, who had been previously examined by the plaintiff, and could not testify to anything material to the issue, on the part of the defendant. *Wildemuth* v. *High*, 321
2. Costs on appeal from decree of Orphans' Court ordered to be paid out of the fund in *The Matter of Koch's Estate*, ... 338

CURTESY.

1. There can be no tenancy by the curtesy of a remainder or reversion vested in the wife, if the particular estate continue till the death of the wife. This doctrine applies as well to equitable as to legal estates. *Chew* v. *Comm. of Southwark*, 160
2. Therefore, a mere naked seisin of the freehold by the wife, as trustee, will not support tenancy by the curtesy; though she has the beneficial interest in the reversion, *Ibid.*

DEBTOR AND CREDITOR.

1 Property placed by the debtor in the hands of the creditor, is not to be construed as having been received in full discharge of the debt, unless that plainly appears to have been the intention of the parties.
2. When, therefore, F. had borrowed the note of the plaintiff, engaging to provide for it, if not paid out of funds shipped to Gibraltar, and afterwards borrowed from him another note, declaring in the receipt given for it, that he had indorsed a bill of lading for goods as a collateral, after which, the parties entered into an agreement under seal, which, after reciting that A. was desirous of securing to plaintiffs the full amount of their note, transfers to them coffee and other merchandise, expected to arrive from abroad, "to have and to hold for the payment of their debt," stipulating that whatever sum might remain in the hands of the plaintiffs, from the net proceeds of the coffee or other merchandise, after payment of the debt, should be returned to F. or his assigns, it was held, that this agreement constituted the assignee, not the sole but the qualified owner of the merchandise, transferring to him an interest in it only as a collateral security; that the relation of debtor and creditor still continued between the assignor and the assignee, and that consequently, the assignee having sold the merchandise fairly on account of the assignor, and a loss having happened without his fault, no more of the debt to him was cancelled than the amount of money received by him from the estate of the vendee. *Perit* v. *Pittfield*, ... 166
3. Nor is the debt discharged by a compromise, entered into by the plaintiffs with the vendee with the assent of the defendants, the assignees of F., ... *Ibid.*

DEVISE.

1. Testator devised to his daughter C. when she came of age, "to be hers during her natural life; then to be her only heir during its life." C. was the sole heir of the testator at his death The devise to C.'s heir is not void for uncertainty. But C. takes an estate for life, with contingent remainder for life, to the person who should be her heir;

heir being *designatio personæ*. *Bennett* v. *Morris*, ... 9

2. Testator devised to his son A. a messuage to hold to him during the term of his natural life; and if he should thereafter have issue of his body lawfully begotten, then to him, his heirs and assigns forever; but in case he should die without leaving such issue, then to all the rest of testator's children, their heirs and assigns forever, as tenants in common A. suffered a common recovery and had issue, who died during his life.

Held, that the ulterior limitation was a contingent remainder, and not an executory devise, and was barred by the recovery. *Waddell* v. *Rattew*, 231

DONATION LANDS.

The number on the corner tree under the provision of the act of the 24th of March, 1795, directing the mode of distributing the donation lands, controls the boundaries in the general draft in locating the patent. *Smith* v. *Moore*, ... 348

DISTRIBUTEE.

The 41st section of the act of the 24th of February, 1834, which directs, that when a distributee of an intestate's estate is unable to give the security to refund, required by the act, the fund shall be put at interest on security approved by the Orphans' Court, includes cases pending at the passage of the act. *Koch's Estate*, ... 338

ELECTION.

1. Where there is any doubt as to the validity of an election, the court will not interfere by *mandamus*, but will put the parties in the first instance to an information in nature of a *quo warranto*. *Commonwealth* v. *The County Commissioners*, ... 75

2. A disorder having arisen at a ward election for assessors and inspectors of the general election, the constable of the ward and the persons alleging themselves to have been chosen judges, adjourned the election from the usual place designated in the constable's notice to a neighbouring house, where the relators had the highest number of votes, and were returned by the constable as duly elected. The electors who remained at the usual place designated in the notice, elected judges, and held an election without calling in the overseers of the poor or other persons pointed out by the act of assembly. The persons here elected were returned by the judges to the county commissioners as duly elected.

Held, that both elections were illegal: and that this being a case of failure to elect, assessors were appointed by the county commissioners, ... *Ibid.*

3. The commissioners have power to inquire into the regularity of a ward election; and the constable's return is not conclusive on them, *Ibid.*

EQUITY.

Of the equity of the holder of a subsequent lien, as to a discharge of part of the land by a prior lien creditor. *Taylor's Executors* v. *Maris*, . . . 51

WRIT OF ERROR.

Upon an application by a party collaterally interested, to open a judgment confessed, the cause was by agreement, referred to an auditor voluntarily chosen by the parties, to report the amount due the plaintiffs. The auditor made a report upon which the court rendered a judgment: Held, that such a judgment is not the subject of a writ of error. *Allen* v. *Myers and others*, ... 335

ESCHEAT.

1. Though escheats take effect in Pennsylvania, not on principles of tenure, but by force of our statutes, yet these statutes require the decedent to have been seized at his death. *Desilver's Estate*, ... 111

2. The bargain and sale of a lunatic being void, evidence is admissible on the part of the Commonwealth, on the the trial of a traverse of an inquisition of escheat, to show the insanity of the decedent at the time he executed a deed of bargain and sale, ... *Ibid.*

EVIDENCE.

See ADVANCEMENT.

1. A judgment or decree of a court is evidence in another suit, only as

against parties and privies. *Yard* v. *Cramond*, ... *Ibid.*

2. A will of lands may be given in evidence on proof of its execution, notwithstanding a verdict and judgment in an issue of *devisavit vel non* from the Register's Court, against the validity of the will. *Smith* v. *Bonsall*, 80

3. In an action to recover contribution, brought against a co-obligor in a bond, the defendant agreed to submit to the obligee the decision of the fact of payment to him, of the bond by the plaintiff.

Held, that counter declarations of the obligee, whether in conversation or on oath, were admissible to show his want of good faith or of memory. *Craig* v. *Craig*, . . . 91

4. A receipt purporting to be for a sum equivalent to the defendant's proportion of the debt, given by the obligee, is not evidence of exoneration against a co-obligor in an action to recover contribution, . *Ibid.*

5. Statements by a witness at another time, though admissible to contradict, are not equally so to confirm him, ... *Ibid.*

6. This is the general rule. But consonant declarations may be given in contradiction of evidence, tending to show that the testimony at the bar is a fabrication of recent date, and to show that the same statement was made before its ultimate effect on the question trying, could have been foreseen, ... *Ibid.*

7. Proof of payment in money is not absolutely indispensable to sustain a count for money paid, laid out, and expended, ... *Ibid.*

8. The inability of a witness to answer an improper question cures the error in allowing it to be put. *Lewis* v. *Baker*, ... 114

9. In an action against a clergyman to recover the penalty given by the act of 1729, to prevent clandestine marriages; the burthen of proof lies on the plaintiff to show that there was no publication of banns. *Helffenstein* v. *Thomas*, ... 209

10. The making of a will in writing, and its contents cannot be established by evidence of the verbal declarations of the deceased, going to show that he had made a will in writing, and how he had disposed of his estate by it, in the absence of the *corpus* of the will, and of all evidence that it had been seen by the witness. *Clark* v. *Morton*, ... 235

11. Policy of insurance against fire expressed to be made according to certain conditions, one of which provided that the insured should deliver to the secretary of the insurers, a particular of what materials the walls and roof of the building insured are constructed, and that if any person should insure his or their building or goods, and cause the same to be described in the policy, otherwise than as they really are, so as the same be charged at a lower premium than therein proposed, such insurance shall be of no force. In an action by the insured against the insurers, who took defence on the ground of an alleged misdescription of the premises in the policy; Held, that parol evidence was admissible, that the misdescription, if any, arose from the mistake of the secretary of the insurers, to whom the buildings were particularly and accurately described at the time of the insurance. *Moliere* v. *The Pennsylvania Fire Insurance Company*, 342

EXECUTIONS.

1. A levy on personal property left in the defendant's hands by the request, and at the risk of the plaintiff, for the purpose of securing his claim, and to prevent a sale of the goods for the payment of other creditors, is fraudulent and void, as against a second execution creditor. *Corlies* v. *Stanbridge*, ... 286

2. A. on the 25th May, 1829, issued a *fi. fa.* to August Term, 1829, returned "levied on real and personal property as per schedule annexed; the personal property left in possession of defendant, by request and at the risk of the plaintiff," and on the 23d of October, 1829, issued an *alias fi. fa.* to November Term, 1829, returned "levied on lands on *fi. fa.* to August Term, 1829, and condemned as per annexed inquisition."

B. on the 2d of April, 1830, issued a *fi. fa.* returned levied, subject to the lien of A.'s *fi. fa.*; under a *venditioni exponas*, on which, issued the 6th of April, 1830, the property was sold.

Held, that B. was entitled to take the proceeds out of court, . . *Ibid.*

3. Quere, whether the issuing an *alias fi. fa.* and levy on real estate, followed by condemnation, is not itself an abandonment of a levy on personal estate, made under the *fi. fa.*? . *Ibid.*

EXECUTORS.

1. Executors are liable as such only on the contract of their testator; and where they are sued on their own promise though they are named as executors, they cannot appeal from an award of arbitrators without entering into a recognizance of bail. *Masterson* v. *Masterson*, . 137

2. A. a resident of Calcutta died, possessed of a considerable amount in the American funds, which he bequeathed specifically to his sons upon various trusts.

Held, That a local administrator *cum testamento annexo, durante absentia*, was entitled to the fund, in preference to those claiming under the foreign executor. *Willing* v. *Perot*, 264

3. Debt on bond against executors. Plea, that before suit brought defendants were discharged on settlement of their accounts by decree of the Orphans' Court, unreversed and unappealed from, and so they were not executors at the time of suit brought, alleging that they had fully administered. Replication, that before their discharge they had delivered up certain goods and bonds of the estate, without consideration and without accounting therefor, alleging a *devastavit*, by means whereof the estate at the time of their discharge was insufficient to pay debts, and that defendants had not fully administered. Demurrer to this replication.

Executors who have appropriated the assets of the estate to the payment of legacies instead of the debts of the testator, and upon settling their administration account afterwards in the Orphans' Court, have obtained a discharge from their executorship, remain liable notwithstanding to the creditors for the assets so applied to the payment of the legacies. *Thomas* v. *Riegel*, 266

EXECUTORY DEVISE.

See CONTINGENT REMAINDER.

FORBEARANCE.

How far forbearance to sue is a good consideration for a promise to pay. *Downing* v. *Funk*, ... 69

GUARDIAN.

1. A father who is of ability to support and educate his child, is not entitled to charge for his maintenance and education, and the expenses of his voyage abroad. *Harland's Accounts*, ... 323

2. There is no rule in Pennsylvania that compound interest may not be charged in case of corruption, . *Ibid.*

3. But where the estate has been managed with fidelity and no unnecessary delay in investing, the guardian is chargeable only with the interest actually made on sums invested, computed from the date of each investment; and with simple interest on the uninvested sums retained in his hands, computed from the receipt of each, . . . *Ibid.*

HEIR.

Quere. Whether under a gift or devise to heir or heirs in Pennsylvania, the heir at common law, or the heirs according to the intestate act, be entitled? *Bennett* v. *Morris*, . . . 9

INDICTMENT.

1. An averment in an indictment against a justice for refusing a copy of his proceedings, of a tender of eighteen and three-quarter cents for a copy of his proceedings at large is sufficient. *Bailey* v. *The Commonwealth*, ... 59

2. An indictment does not lie against a collector of taxes for embezzlement of moneys received by him for taxes; the act of 1799 having pointed out a specific remedy. *Hellings* v. *The Commonwealth*, ... 64

INQUISITION.

1. It is no objection to an inquisition valuing real estate, that the jurors made separate estimates of value, which were added together and the medium value extracted, and returned as their valuation of the property; this course having been resorted to, not as decisive of the question, but as an approximation to unanimity. *White* v. *White*, . 61

2. Nor is the validity of the inquisi-

tion affected by the presence of the sheriff with the inquest, where there did not appear to have been any improper interference with their duties on his part, ... *Ibid.*

INTEREST.

1. A. and B. entered into an agreement under seal, which recited that the former had purchased from the latter a house and lot in the city of Philadelphia: That the wife of C., the former owner of one-fifth of the property, had not executed the deed made by her husband and others, to B.; and that consequently, if she should survive her husband, she would be entitled to dower in the same, and that it had been agreed that a certain sum being one-third part of a fifth of the consideration-money should remain in the hands of A. until the decease of the wife of C., or until she should release her dower. A. then covenanted to pay to B. the sum so retained on the decease of the wife of C. or whenever a release of dower duly executed by her, should by the said B. be produced and delivered to him "with lawful interest on the said sum, provided the same shall not exceed eighteen months from the date" of the agreement. The wife of C. died on the 17th of October, 1826, and the first notice which A. received of her death, and the first demand made upon him for payment of the money, was the institution of an action of covenant on the agreement, on the 13th of August, 1832.

   Held, that the plaintiff was entitled to recover the principal sum retained by the defendant, with interest from the death of the wife of C. *Troubat* v. *Hunter*, ... 257
2. There is no rule in Pennsylvania that compound interest may not be charged in case of corruption. *Harland's Accounts*, ... 323
3. But where the estate has been managed with fidelity and no unnecessary delay in investing, the guardian is chargeable only with the interest actually made on sums invested, computed from the date of each investment; and with simple interest on the uninvested sums retained in his hands, computed from the receipt of each, ... *Ibid.*

JUDGMENT.

1. The holder of a judgment a lien on land, a portion of which is covered by a subsequent mortgage, does not by releasing a part of the land bound by the judgment, impair his right to be paid out of the remainder, including the portion embraced in the mortgage, unless the mortgagee has distinctly notified him of his mortgage before the release; and cautioned him against doing an act by which the mortgagee's security may be diminished: and the recording the mortgage is not such notice. *Taylor's Executors* v. *Maris*, . . . 51
2. A. being about to borrow money of B. on mortgage through the agency of C. a money broker, it appeared by the certificates that a judgment was outstanding against him. C. produced to him the receipt of the judgment creditor for the amount of the judgment; upon which B. lent the money.—Afterwards A. being in want of more money applied to D. for a loan; and to satisfy him that the property was clear of incumbrances obtained from B. the certificate, together with the receipt of the judgment creditor; upon which D. made the loan. In the meantime C. had procured the judgment creditor to mark the said judgment to his use, and it so appeared on the certificates of judgment obtained by D. Held, that the lien of this judgment was extinguished by the payment of the money and could not be revived by the marking to the use of C and under the circumstances, that D. was entitled to payment in preference to C. *Waters* v. *Largy*, ... 131

JURISDICTION.

1. The Mayor of the city of Philadelphia had no jurisdiction of an action to recover a penalty for the breach of the ordinance passed 28th March, 1822, relating to the markets. *Spicer* v. *Rees*, ... 119
2. The District Court for the city and county of Philadelphia has jurisdiction of an action against a clergyman to recover the penalty for marrying a minor without consent, &c., under the act of 1729. *Donahue* v. *Dougherty*, ... 124

JURORS.

1. Affidavits of jurors are inadmissible

to inculpate their fellows or themselves. *White* v. *White*, ... 61
2. As to separate estimates of value made by jurors and medium value extracted therefrom, ... *Ibid.*

JUSTICE OF THE PEACE.

1. In an indictment against a justice of the peace, for refusing a copy of his proceedings, an averment of a tender of eighteen and three-quarter cents for a copy of his proceedings at large is sufficient. *Bailey* v. *The Commonwealth*, ... 59
2. An appeal does not lie from the judgment of a justice of the peace, where the amount of the demand is not set forth in his docket. *Walter* v. *Bechtol*, ... 228
3. Payment of all the taxed costs is essential to perfect an appeal; and it is error to refuse to strike off an appeal when all the taxed costs have not been paid, ... *Ibid.*
4. As to costs on appeal from judgment of justice. *Wildemuth* v. *High*, 321

LEGACY.

1. Testator devised to each of his grandsons, A. and B., a tract of land in fee simple, from and after their arriving at twenty-one years of age respectively, when they were to have possession of the land: subject each to the payment of a sum of money, making together four thousand dollars, on their arriving at age; which sum he bequeathed to his four granddaughters to be equally divided amongst them and paid by his grandsons as they arrived at twenty-one years of age respectively.

One of the granddaughters attained the age of twenty-one years after A. had arrived at majority, but during the minority of B. Her personal representative after B.'s coming of age brought an action for her proportional part of the legacy charged on B.'s land. Held, that he was entitled to recover. *Hodgson* v. *Gemmil*, ... 99
2. Testatrix bequeathed a fourth of the residue of her estate to the defendant, in trust to appropriate, apply, and dispose of the same in such way and manner and for such uses and purposes as her daughter H., notwithstanding her coverture, by writing under her hand, attested by two or more subscribing witnesses, might direct, limit, or appoint, and to and for no other use, intent, or purpose whatever.

H. died during the lifetime of the testatrix, leaving children surviving her of whom the plaintiff was one

Held, That the legacy would have vested absolutely in H. upon the death of the testatrix had she survived her; and that its lapsing was prevented by operation of the act of 19th March, 1810, and the plaintiff entitled to recover his share in severalty. *Schieffelin* v. *Kessler*, . . 115

LIEN.

Lien of heirs for their shares of the valuation of real estate under partition in the Orphans' Court not discharged by judicial sale. *Wynn* v. *Brooke*, ... 108

LIMITATIONS, STATUTE OF.

An offer to purchase the acquittance of a debt, barred by the statute of limitations, is an offer of compromise, which is insufficient to raise a promise to pay by implication of law. *Gest* v. *Heiskill*, ... 134

LUNATIC.

1. The feoffment and livery of a lunatic or madman are not void, but voidable; and as they work a divesture of his seisin, they preclude the possibility of an escheat by his death, because seisin must be found at his death, as well as failure of heirs, devisees, or known kindred; and though escheats take effect in Pennsylvania, not on principles of tenure, but by force of our statutes, yet these statutes require the decedent to have been seized at his death. *Desilver's Estate*, ... 111
2. But a deed of bargain and sale, though by the express words of the statute, it has the force and effect of a feoffment and livery for the purpose "of giving possession and seisin, and making good the title and assurance," is not equivalent in all respects to a feoffment and livery, and if executed by a lunatic or madman, it is void, . . . *Ibid.*
3. Therefore, on the trial of a traverse of an inquisition of escheat, evidence is admissible on the part of the Commonwealth to show the in

sanity of the decedent at the time he executed a deed of bargain and sale, ... *Ibid.*

MAINTENANCE.

A father who is of ability to support and educate his child, is not entitled to charge for his maintenance and education, and the expenses of his voyage abroad. *Harland's Accounts*, 323

MANDAMUS.

Where there is any doubt as to the validity of an election, the court will not interfere by mandamus—but will put the parties in the first instance to an information in nature of a *quo warranto*. *Commonwealth* v. *County Commissioners*, ... 75

MARRIAGE.

1. As to the action against a clergyman to recover the penalty for marrying a minor, without consent of his parents, &c. *Donahue* v. *Dougherty*, ... 124
2. The grievance, to entitle the plaintiff to recover, is not necessarily an actual and specific damage; it is sufficient that the marriage is an unjustifiable interference with the relation existing between the parent and his offspring, and in that aspect, a grievance in contemplation of law, ... *Ibid.*
3. It is no defence that the clergyman misconceived the age of the person married, ... *Ibid.*
4. The District Court for the city and county of Philadelphia, has jurisdiction of this action; it being a civil remedy for a private injury, . *Ibid.*
5. The acts of assembly of 1700 and 1729, to prevent clandestine marriages, are not obsolete in their provisions for publication of banns. *Helffenstein* v. *Thomas*, ... 209
6. In an action against a clergyman to recover the penalty given by the latter act, the burthen of proof lies on the plaintiff to show that there was no publication of banns, . . . *Ibid.*
7. The action may be sustained, although the minor was not dependent on his parent for support, but lived away from his parent and supported himself, ... *Ibid.*
8. The law implies injury to the parent without proof of actual damage, ... *Ibid.*

MARRIAGE SETTLEMENT.

A postnuptial settlement made to secure moneys borrowed by the husband from the wife's separate estate secured to her previous to marriage may be valid against creditors. *Boyle* v. *Abercrombie*, ... 149

MECHANICS' LIEN.

1. A mechanic's lien filed by a member of an association for purposes of mutual benevolence among its members only, against a building erected by it, is not available against the liens of others not members. *Babb* v. *Reed*, ... 151
2. A claim to perpetuate the lien of a mechanic or material man, if within time in other respects, may be filed after a judicial sale of the premises. *Burt* v. *Kurtz*, . . . 246
3. The commencement of a building under the act of the 17th of March, 1806, relating to the lien of mechanics and material men, is, the first labour done on the ground which is made the foundation of the building, and to form a part of the work suitable and necessary for its construction; and that continues the same, notwithstanding the right of property in the ground and building may have been subsequently changed, or the plan be altered, so long as the original design of its character is retained. *Pennock* v. *Hoover and Myers*, ... 291
4. A joint lien may be filed against several houses, the property of the same person, ... *Ibid.*
5. A mechanic or material man doing work in, or furnishing materials for the construction of two or more contiguous houses belonging to the same person, under a general request, without any specific contract for each house separately, may either file his claim for the amount against all the houses jointly, or he may apportion it among them according to the value or price of the materials or work, and file a separate claim accordingly, ... *Ibid.*
6. The lien of the mechanic and material man does not extend beyond ground necessary to the proper occupation and enjoyment of the house, according to the intention and design of the owner at the time of its commencement, ... *Ibid.*

7. An assessment by the commissioners of Kensington District, for paving, is, under the act of the 3d of February, 1724, relating to taxes on real estate in the city and county of Philadelphia, a lien entitled to priority over the claims of mechanics and material men, and judgment creditors, ... *Ibid.*
8. Where eighteen buildings were erected, *semble*, a claim against eight houses without properly designating them, is void for uncertainty, and cannot continue the lien after two years, ... *Ibid.*
9. Where a claim was so filed, it was wrong to apportion the claim among all the houses, ... *Ibid.*
10. In the case of a joint lien, each building is liable for the whole amount thereof; and no part of the proceeds of any one of the buildings can be applied to a subsequent incumbrance, so long as the joint lien remains unsatisfied, . . . *Ibid.*
11. A mechanic filed four claims, three of which were jointly charged, each on three of the houses, and a fourth on four of the houses. Each claim embraced houses different from those charged in every other. Held, that each claim should be separately charged on the proceeds of the houses specified in it, and not the aggregate charged as one entire claim jointly on the thirteen houses embraced in the four several claims, ... *Ibid.*

MONEY PAID.

Proof of payment in money not absolutely indispensable to a count for money paid. *Craig* v. *Craig*, . . 91

MORTGAGE.

1. The recording a subsequent mortgage is not constructive notice to the holder of a prior lien. *Taylor* v. *Maris*, ... 51
2. J. A. by a postnuptial settlement made to secure moneys borrowed by him from the wife's separate estate, secured to her previous to marriage, conveyed land in trust for the sole and separate use of his wife, with full powers of limitation and appointment to her, with or without the concurrence of her husband.

J. A. and his wife mortgaged all the estate, right, title, and claim of both of them in the premises to a *bona fide* lender of money. Held, that the settlement was not on its face fraudulent as against creditors of the husband; and there being no evidence of fraud to impeach it, it was held, that under a sheriff's sale of the premises, on a judgment against J. A., subsequent in point of time to the mortgage, the mortgagee had a right to come upon the fund for payment, and was entitled to priority over the judgment. *Boyle* v. *Abercrombie*, ... 144

NOTICE.

1. As to the notice necessary to be given by the holder of a lien on land covered by a prior lien, to the holder of the prior lien, so as to affect him with an equity in the event of his releasing a part of the land. *Taylor* v. *Maris*, ... 51
2. The effect of notice by a carrier, to limit his responsibility. *Beckman* v. *Shouse*, ... 179

ORPHANS' COURT.

See DISTRIBUTEE.

1. Questions of advancement may be, but it seems need not necessarily be settled in the Orphans' Court. *Earnest* v. *Earnest*, ... 213
2. As to the practice in making distributions, ... *Ibid.*

PARTITION.

Testator devised certain real estate in the first instance to his daughters in fee simple; and afterwards directed that in the division of the estate, the real property should be valued and allotted to the sons; and that the shares and dividends of his real and personal estate in his will given or intended for his daughters, should remain and be vested in his wife and sons in trust for the separate use of his daughters for life, with limitations over in the event of their death without leaving children. He further directed that the shares of his daughters should be placed at interest, and the principal and interest paid to his daughters from time to time, as his executors should think best, and that the principal of the dividends of his daughters, in the valuation of

his real estate, if taken by his sons at the valuation, should not be demandable by his daughters under five years. The sons refused to take at the valuation. Held, that the case had not arisen under which the trusts of the will as to the daughters' portions could go into operation: and that they were entitled to partition. *Miller* v. *Schneider*, ... 140

PARTNERSHIP.

The members of an unincorporated association for purposes of mutual benevolence among its members only, are considered as partners in their relation to third persons, and the property of the association must be appropriated to pay the debts of creditors, not members of the association, before it can be applied to the payment of the claims of those who are members. *Babb* v *Reed*, 151

PAYMENT.

The general principle is that property placed by the debtor in the hands of the creditor is not to be received in absolute payment, unless that plainly appears to have been the intention of the parties. *Perit* v. *Pittfield*, ... 171

PLEADING.

See EXECUTORS.

1. In an action against a clergyman to recover the penalty for marrying a minor without consent of his parent, under the act of 1729, a statement is unauthorized. *Donahue* v. *Dougherty*, ... 124
2. Semble, that a plea of submission and award to an action of debt on a bill obligatory, of all matters in variance between the parties, stating that the said writing obligatory, was then and there a matter in variance, without averring that the payment of the bill obligatory was a matter in variance, is sufficient. *Kemmerer* v. *Young*, . . 175

PRACTICE.

1. Affidavits of jurors are inadmissible to inculpate their fellows or themselves. *White* v. *White*, . . . 61
2. It is no objection to an inquisition valuing real estate, that the jurors made separate estimates of value, which were added together, and the medium value extracted, and returned as their valuation of the property: this course having been resorted to, not as decisive of the question, but as an approximation to unanimity, ... *Ibid.*
3. Nor is the validity of the inquisition affected by the presence of the sheriff with the inquest, where there did not appear to have been any improper interference with their duties on his part, ... *Ibid.*
4. In an action against a clergyman to recover the penalty for marrying a minor without consent of his parent, under the act of 1729, the plaintiff filed a statement, to which the defendant demurred: and afterwards a declaration in debt, which he was allowed by the court to substitute for his statement, and judgment of *respondeat ouster* was entered on the demurrer.

   Held, that the statement being unauthorized by the act of assembly was a nullity, and the plaintiff might declare as though no legal specification of the cause of action had been made, and the judgment of *respondeat ouster*, though unnecessary, did not vitiate the subsequent proceedings. Nor was the verdict bad as being founded in part on the defective statement, which was a mere nonentity and entirely superseded by the declaration. *Donahue* v. *Dougherty*, ... 124
5. A judgment after a trial, on the merits, is not to be treated as erroneous, because there was no plea, *Ibid.*
6. A writ in debt is within the remedy prescribed by the act of 1729, by "bill, plaint, or information," *Ibid.*
7. When there is judgment on a writ of error that a plea demurred to is defective, and there is another plea, and the cause is remanded for trial on that plea, the case stands in the court below subject to the provisions of the act of 21st March, 1806, and the defendant may alter his defence on or before the trial, as in other cases. *Kemmerer* v. *Young*, . . 175
8. The plaintiff proceeded originally by *capias* indorsed, "no bail required." It was not served according to the rule of court, the defendant not having subscribed a note in

writing empowering the prothonotary to enter their appearance. The sheriff returned "*cepi corpus*, and defendants discharged on common bail."

Held, that the return was nugatory and did not authorize an appearance to be entered. *Jones* v. *Orum*, . 249

9. Plaintiff entered a rule of reference upwards of ten years after the writ issued, and returned without being duly served, and no step taken by him during that period to continue the action, and obtained an award against all the defendants.

Held, that the rule was irregular, and that the irregularity was not waived by a general appearance by an attorney, entered after the rule of reference, but before the appointment of arbitrators; the appearance having been amended by the court below, so as to stand for one of the defendants only, ... *Ibid.*

10 The first argument of a case is matter of right; rearguments are subject to the order and direction of the court. *Moliere* v. *The Penn. Fire Ins. Company*, ... 342

11. Upon an application by a party collaterally interested, to open a judgment confessed, the cause was by agreement referred to an auditor voluntarily chosen by the parties to report the amount due the plaintiffs. The auditor made a report, upon which the court rendered a judgment. Held, that such a judgment was not the subject of a writ of error. *Allen* v. *Myers*, ... 335

PROBATE.

Effect of probate of will, as to real estate. *Smith* v. *Bonsall*, . . . 80

RECORDING.

Recording a subsequent mortgage is not constructive notice to the holder of a prior lien. *Taylor* v. *Maris*, . 51

REGISTER'S COURT.

Decision of Register's Court on a will of land is not conclusive, whether it be for or against the validity of the will. *Smith* v. *Bonsall*, ... 80

RELEASE.

The holder of a judgment lien on land, a portion of which is covered by a subsequent mortgage, does not by releasing a part of the land bound by the judgment, impair his right to be paid out of the remainder, including the portion embraced in the mortgage, unless the mortgagee has distinctly notified him of his mortgage before the release; and cautioned him against doing an act by which the mortagee's security may be diminished; and the recording the mortgage is not such notice. *Taylor's Executors* v. *Maris*, . . . 51

ROADS.

It is not a sufficient ground for setting aside a report of a road jury, that the jurors are entertained on the day of the view at the house of a petitioner, and at his expense, there being no special circumstances of abuse in the case. *Road in Plymouth Township*, ... 150

STATUTES.

The 41st section of the act of the 24th February, 1834, which directs that when a distributee of an intestate's estate is unable to give the security to refund, required by the act, the fund shall be put at interest on security approved by the Orphans' Court, includes cases pending at the passage of the act. *Koch's Estate*, 338

SURETY.

1. Payment by a surety before the maturity of the debt, is not necessarily voluntary. *Craig* v. *Craig*, 91

2. A surety is entitled to reimbursement of the money which he has been obliged to pay for his principal with interest; but he cannot speculate on his principal, and by compromising with the creditor for a sum less than the debt, and taking an assignment of it, compel the principal to pay him the whole amount of the debt. Nor can he, if he has unnecessarily incurred expenses in resisting the claim of the creditor, compel the principal to reimburse him such expenses, even where the engagement is to indemnify the surety and keep him harmless. *Wynn* v. *Brooke*, ... 106

3. Therefore, where real estate had

been adjudged by the Orphans' Court to a son of an intestate who became bound, with two sureties, in bonds conditioned for the payment of the respective shares of the other children of intestate, part of the money to be paid in one year from the date of the bonds, and the residue upon the death of the widow of the intestate (which was charged upon the land), and after the death of the widow, one of the children having brought suit against the administrator of one of the sureties, who, by pleading attempted to postpone the claim of the plaintiff upon the estate of the surety, till resort could be had to the land of the principal, which then had passed into other hands, and afterwards compromised the suit by paying the plaintiff one-half the debt and interest, and all the costs of suit, and at the same time had the suit marked to the use of the intestate, to enable, as the agreement stated, "the defendant to proceed against the land, without prejudice to his right as surety," the plaintiff at the same time acknowledging, by an instrument under hand and seal, to have received of the administrator of the surety, full satisfaction for the debt, interest, and costs, and in consideration thereof assigning all his right, title, claim, interest, demand, security, and lien upon the land, and all right of action against the then owners or terre tenants and all other securities, &c., for the debt

Held, that the administrator for the surety could only recover the money actually paid upon the compromise of the debt, with interest, but without any of the expenses incurred in resisting the claim of the creditor. *Ibid.*

TREATY WITH SPAIN.

1. The decision of the commissioners under the treaty with Spain, of the 22d of February, 1819, are, upon all matters, both of law and fact, within the scope of their authority, conclusive, and not open to review, either directly or collaterally, by suit. *Yard* v. *Cremond*, ... 18

2 Quere, whether or not it was the intention of the contracting parties to the treaty to include all cases of American property traversing the ocean in American vessels, under the protection of the American flag, engaged in lawful commerce, and owned by merchants residing and carrying on trade in any of the ports of the United States, under the sanction of the laws of the United States, whether citizens in the strict sense of the term by birth or naturalization, or in its more extended sense, by domiciliation for commercial and other purposes, and assuming the national character of the country in which they reside, ... *Ibid.*

3. Where the claims of various persons for indemnity under the treaty, for the loss of cargoes seized and sold in a Spanish port, by order of the public authorities, part of the proceeds of which had been deposited in the Royal Treasury at Lima, and part was due from a Spanish merchant, who had received it, were presented to the commissioners by a common agent, from whose memorial and the accompanying proofs it appeared, that three of those under whom claims were made, were foreigners, domiciliated in the United States, and carrying on trade as American merchants, at the time the loss occurred, and were afterwards, and before the date of the treaty, naturalized citizens of the United States: one of them was at the time of the loss, a foreigner domiciliated in the United States, and carrying on trade as an American merchant, but was never naturalized; and all the rest were either native or naturalized citizens of the United States, and the commissioners (after having rejected the first memorial, and receiving another, which supplied the defects of the first), made a decree by which they allowed the claim as valid for the proportion of the claimants, of the net proceeds of the cargo deposited in the Royal Treasury at Lima, "but declared, that from it must be deducted such sums as are claimed by those who are not citizens of the United States, and also, any sum which is claimed under any person who was not such citizen at the time of the loss;" and by a subsequent decree, after adverting to the previous allowance of the claim as valid, they proceed to ascertain the amount thereof, and award to

the claimants a certain sum, "in full for the loss sustained in the arrest of these vessels at Callao, by order of the Spanish authorities, and the sale of their cargoes, in 1801," which sum they direct to be paid to the agent, "for himself and others." Held, that the decision on its face excluded the interests of all those who were not native or naturalized citizens at the time of the loss and of the treaty, and that the decision of the board in other cases in which claims had been made under some of the same persons, that they were citizens within the meaning of the treaty, was not admissible in evidence to show the opinion of the board as to the citizenship of the same persons, in the case before the court, ... *Ibid.*

UNION CANAL COMPANY.

An action was brought by a holder of "old stock" in the Union Canal Company of Pennsylvania, to recover the arrears of an annual interest of six per cent, arising from the avails and net proceeds of the lottery pledged as a fund for the payment of said interest by the third section of the "act supplementary to an act entitled, an act to incorporate the Union Canal Company of Pennsylvania," passed 29th March, 1819.

Held, that there was no debtor to be sued—no fund liable when the suit was brought, and that the plaintiff could not recover. *Swift* v. *Union Canal Co.*, ... 46

WARD ELECTION.

See ELECTION.

WILL.

1. A will of lands may be given in evidence on proof of its execution, notwithstanding a verdict and judgment in an issue of *devisavit vel non* from the Register's Court, against the validity of the will. *Smith* v. *Bonsall*, ... 80
2. The probate of a will respecting lands taken before the register or Register's Court is not conclusive, and there is no distinction between the effect of a decision approving the will and one condemning it, *Ibid.*
3. The making of a will in writing and its contents cannot be established by evidence of the verbal declarations of the deceased, going to show that he had made a will in writing, and how he had disposed of his estate by it, in the absence of the *corpus* of the will and of all evidence that it had been seen by the witness. *Clark* v. *Morton*, ... 235

END OF VOL. V.

LAW DEPARTMENT.
AUG 15 1898
C. R. R. CO. OF N. J.

A 001 010 840 5